TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~344~~ 119.

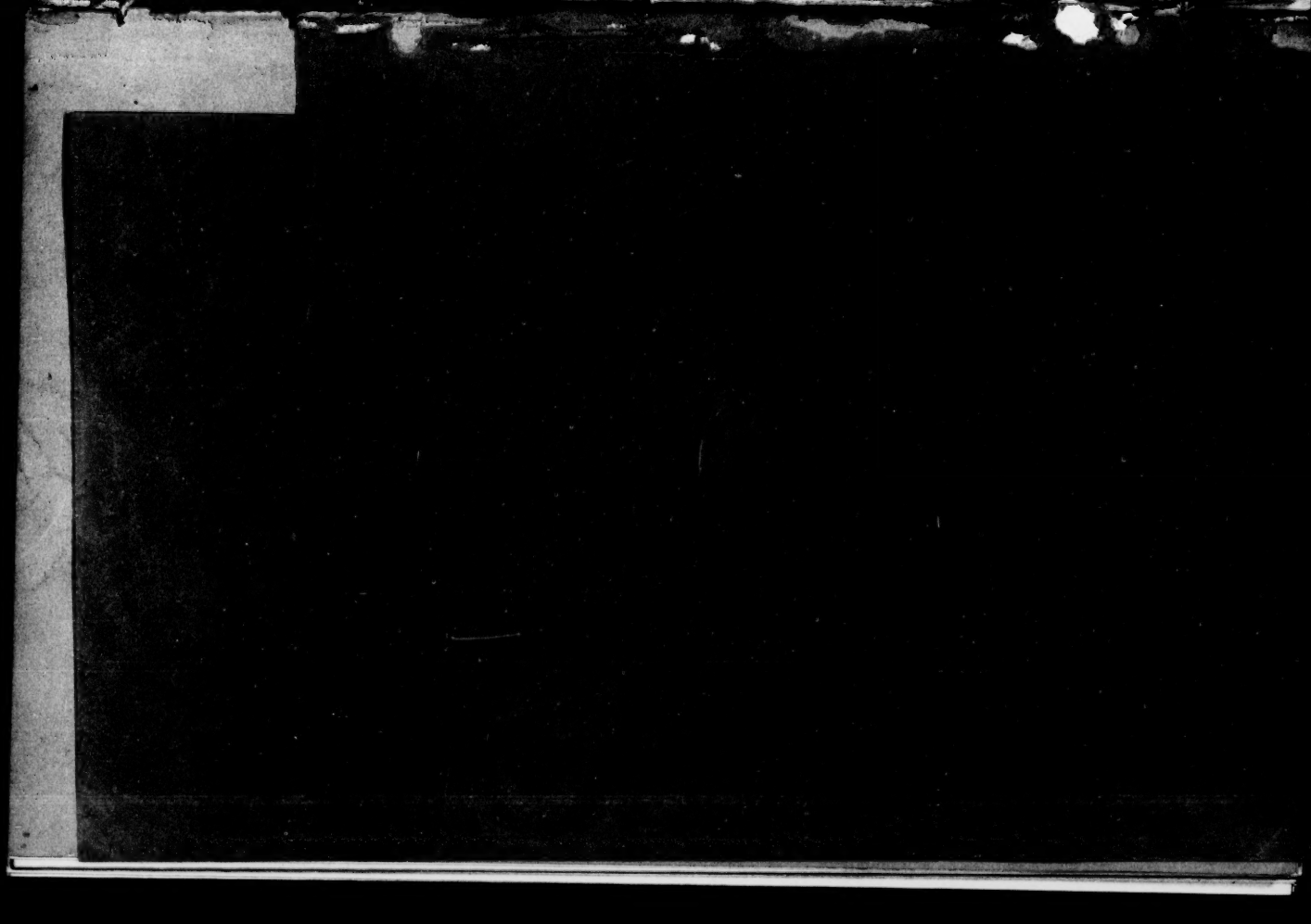
THEODORE OLCOTT, APPELLANT,

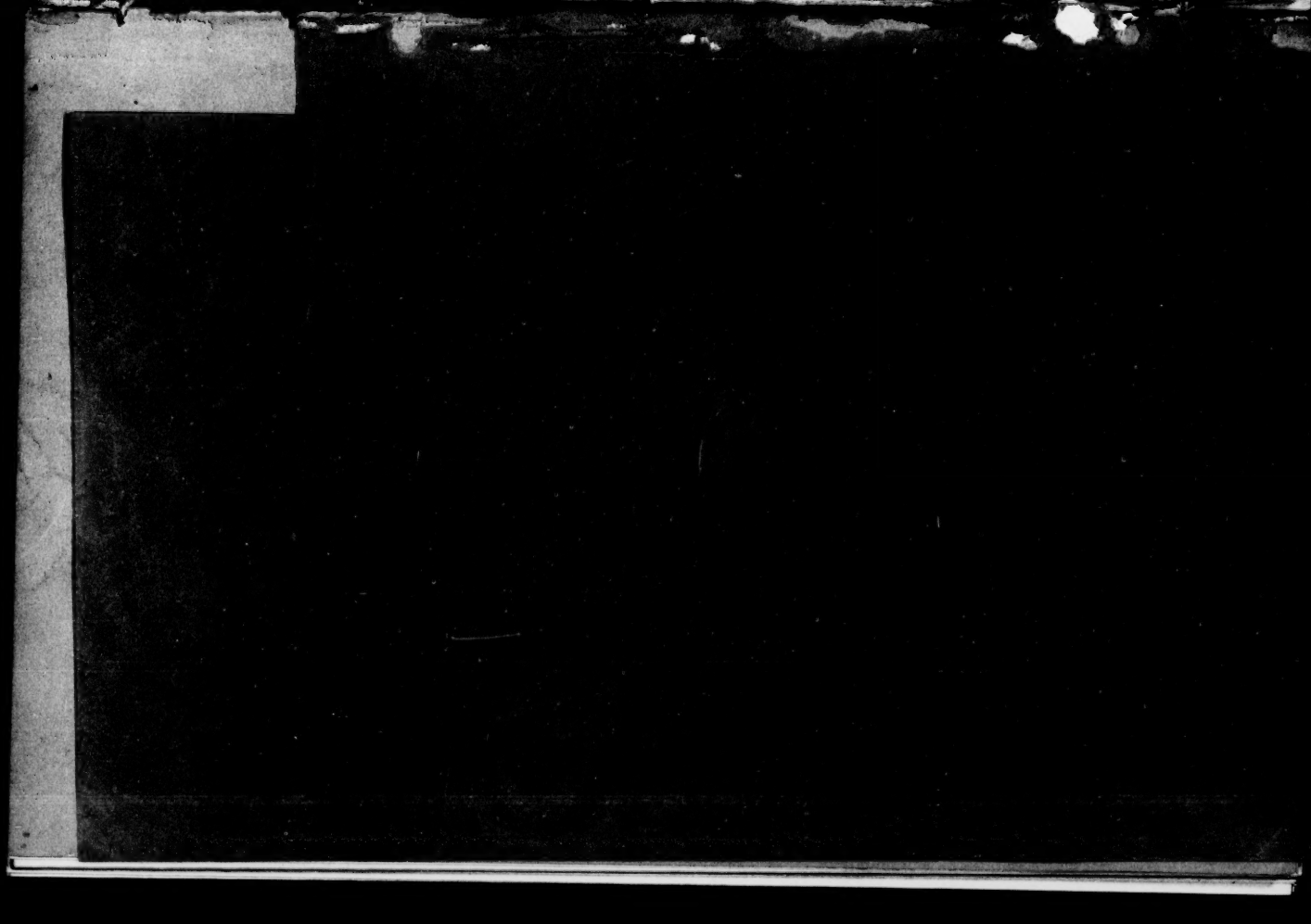
vs.

CHARLES WILKES, ROBERT R. BRIDGERS, B. B. BARRON, JOHN L. BRIDGERS, IN HIS OWN RIGHT, AND AS EXECUTOR OF POWELL, DECEASED, WILLIAM P. BYNUM, AND THOMAS GRIER, TRUSTEES, ETC., WILLIAM SLOAN, AND AARON E. HOVEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH CAROLINA.

FILED OCTOBER 9, 1871.





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INDEX.

	Original.	Print.
Style of cause	1	1
Bond	2	1
Bill of complaint	4	1
Exhibit "A"	29	9
Deed from Groot to Hoyl	42	14
Bynum and Grier to Hovey	47	16
Hovey to Bynum and Grier	50	17
Hovey to Bynum and Grier	55	19
Hovey to Stephenson and Olcott	60	21
Quitclaim with covenant	66	23
Subpœnas to defendants	72	25
Answer of Charles Wilkes	76	26
R. R. and J. L. Bridgers	82	28
B. B. Barron	93	32
W. P. Bynum	96	33
to amendments of bill	118	41
of Thomas Grier	124	43
William Sloan	127	44
Replication	134	47
Deed from Hovey to Stephenson	135	47
Deposition of Thomas Darling	141	49
Aaron E. Hovey	143	50
Theodore Olcott	145	51
Certificate of Governor Fenton	152	53

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Deed from Groot to Hoyl	42	14
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William Sloan	127	44
Replication	134	47
Deed from Hovey to Stephenson	135	47
Deposition of Thomas Darling	141	49
Aaron E. Hovey	143	50
Theodore Olcott	145	51
Certificate of Governor Fenton	152	53

	Original.	Print.
Letter from Bynum to Wilson and Osborne	153	53
Advertisement	157	54
Deposition of A. E. Hovey	160	55
Thomas Darling	173	61
Theodore Olcott	191	69
Exhibit "A"	216	79
B	218	80
C	218	81
D	219	81
Deposition of W. P. Bynum	228	83
Deposition of Dr. William Sloan	253	91
Exceptions to depositions of Bynum and Sloan	259	93
Certificates of stock	262	94
Deposition of Bynum	275	100
Dr. William Sloan	292	106
James H. White	301	110
Exceptions to depositions of Bynum and Sloan	312	114
Will of Hoyl	315	115
Notice to Olcott	324	118
License from Bynum to Muir	326	118
Deed from Groot to Bronson and Beardsley	328	119
Meeting of stockholders, &c	353	127
Extracts, &c	359	129
Extracts, &c	360	129
Agreement of counsel	366	131
Prosecution bond	368	131
Decree	371	132
Bond	372	132
Decree	373	132
Clerk's certificate	374	133

1 UNITED STATES OF AMERICA,
District of North Carolina,
Circuit court, fourth circuit:

Be it remembered that, on the 22nd day of April, A. D. 1868, Theodore Olcott, a citizen of the State of New York, by his solicitor, W. A. Graham, filed his bill in the office of our court of equity, in the circuit court of the United States for the district of North Carolina, against Charles Wilkes, admiral in the Navy of the United States, Robert R. Bridgers, B. B. Barron, and John L. Bridgers, in his own right, and as executor of the last will and testament of Powell, William P. Bynum, and Thomas Grier, executors and trustees of Andrew Hoyle, deceased, William Sloan, and Aaron E. Hovey, and gave bond for the prosecution of his said suit in the words and figures following, to wit:

2 Circuit court of U. S. district of North Carolina.

Know all men by these presents, that we, Theodore Olcott, of the city and county of Albany and State of New York, are held and firmly bound to W'm P. Bynum and Thomas Grier, Aaron E. Hovey, W'm Sloan, Charles Wilkes, Robert R. Bridgers, John L. Bridgers, in his own right and as executor of Powell, dec'd, and B. Barron, in the penal sum of three hundred dollars, for the payment whereof, well truly to be made, we bind ourselves and our heirs, executors, and administrators. Sealed with our seals, and dated this 31st day of March, 1868.

The condition of this obligation is such, that whereas the above-bounden Theodore Olcott and Eben Stephenson have instituted a suit in equity in the circuit court of the United States for the district of North Carolina, as plaintiffs against the above-named obligees as defendants:

Now, if they, the said plaintiffs, shall prosecute the said suit, and shall pay all such costs and damages as may be awarded against
3 them therein, then the said obligation to be void; otherwise to remain in full force and virtue.

T. OLCOTT. [SEAL.]
JOHN A. YOUNG. [SEAL.]

4 Which said bill of complaint, in its amended form, and the exhibits appended thereto, are in the words and figures following, to wit:

In the circuit court of the United States for district of North Carolina.

To the honorable the judges of the circuit court of the United States for the district of North Carolina:

Theodore Olcott, of the city of Albany, New York, a citizen of the said State of New York, brings this, his bill in equity, against Charles Wilkes, admiral in the Navy of the United States, of the county of Lincoln, and State of North Carolina, Robert R. Bridgers, R. B. Barron, and John L. Bridgers, in his own right, and as executor of the last will and testament of Powell, deceased, of the county of Edgecombe, William P. Bynum, and Thomas Grier, executors and trustees of Andrew Hoyle, deceased, of Lincoln aforesaid, and William Sloan, of the
5 county of Gaston, in said State, all citizens of the said State of North Carolina, and Aaron E. Hovey, a citizen of the State of Massachusetts.

And, thereupon, your orator complains and says that he, your orator, is equitably and beneficially entitled to an extensive real estate, situate, lying, and being in the counties of Lincoln, Gaston, and Cleaveland, North Carolina, on the waters of the South Fork of the Catawba River, known as the High Shoals property, and other tracts of land, all which will be hereinafter more particularly described, abounding in iron ore and other minerals, and having situated thereon machinery and fixtures for the manufacture of iron, of a value greatly exceeding the sum of two thousand dollars, now in the possession and occupation of the said Charles Wilkes, under a claim of title adverse to that of your orator, and professing to be derived from, or sustained by, the other defendants hereinbefore named.

That the said real estate was once the property of "The High Shoal Manufacturing Company," a corporation chartered by the general assembly of North Carolina, and was, by direction of said company, by deed dated the 24th day of February, A. D. 1854, conveyed by Andrew Hoyle, president of the same, to Philip W. Groot, of the State of
6 New York in fee simple. The bounderies and other description of the said lands are distinctly set forth in the said deed, which has been duly proved and registered in all the three counties last aforesaid; and your orator begs to refer to this deed for their particular identification; and a copy thereof is deposited in the office of the clerk of this court with this bill of complaint, for easy reference marked A. It represents the quantity as about fourteen thousand eight hundred and seventy-three acres, and conveys the whole, with the mines, minerals, manufactories, furnaces, mills, buildings, machinery, &c., together with the tools, machines, implements, and other things belonging to said company, then onthe premises, for and in consideration of the sum of seventy-five thousand dollars.

That on the same day the said Philip W. Groot reconveyed the said premises to the said Andrew Hoyle in fee, in trust to secure the sum of fifty thousand dollars, a balance of the purchase money therein specified, the last instalment of which was to be paid on or before the 1st day of September, 1855, with a stipulation that if the payment should not then be made, the said Hoyle, his heirs, executors, and administrators might enter and sell to satisfy the same.

That the said Hoyle, having departed this life, leaving his last
7 will and testament in writing, which was duly proved and allowed in the proper court, and in which the aforesaid William P. Bynum and Thomas Grier were nominated as executors, and who assumed the said office; and a balance of about forty-eight thousand five hundred dollars of said debt, still remaining due the said Bynum and Grier, executors, under the power conferred on them by said last will and testament, and by virtue of the deed in trust to their testator as aforesaid, were called upon by their cestui's que trust, in the latter part of the year 1858, to close up the transaction.

It appeared that the aforesaid Philip W. Groot had associated with himself sundry other citizens of the State of New York in the purchase of the property aforesaid, in the hope of mining with success for gold upon the same; that miners had made explorations, and some gold had been obtained; but after the lapse of three or four years, the expectation of profit from this source was abandoned, and the parties interested determined to suffer the property to be sold for the balance of the purchase-money then due as aforesaid.

In this condition of the affair it was agreed between the stockholders of The High Shoal Manufacturing Company, acting through their agent,

the aforesaid William P. Bymun, and your orator, Theodore
8 Olcott, and Eben S. Stephenson, a citizen of the State of Connecticut, interested in the said company, and then on the premises aforesaid, that your orator and said Stephenson should become the purchasers of the property aforesaid, at the sum of forty-eight thousand five hundred dollars, by at once paying and satisfying the sum of eight thousand five hundred dollars, and giving a mortgage on the property for the balance of forty thousand dollars, with interest, in three equal instalments, payable, respectively, on the 1st day of January, 1860, the 1st day of February, 1860, and the 1st day of January, 1861. No competition was apprehended against such a bid at public sale, and it was further agreed to set up the property according to the deed in trust at a sale by auction.

The defendant, Aaron E. Hovey, had been a subaltern employé of the aforesaid New York company in the same, without any capital or credit on which to raise money, and had been brought and retained there chiefly to obtain the service of his wife, who acted as house-keeper for the agents of the said company on the premises. Your orator and the said Stephenson, designing to endeavor to interest other persons at the North in their purchase, procured the said Hovey to become the
9 bidder for the property, and to take the title and execute the deed in trust, by way of security, in his own name, but without one cent of interest therein on his part. All this was well known to Mr. Bynum, and will not be denied by the said Hovey.

According to this arrangement the auction took place. Hovey made a single bid of forty-eight thousand five hundred dollars, and was declared the purchaser. Your orator and the said Stephenson paid the sum of eight thousand five hundred dollars to Mr. Bynum, the latter raising his contribution, in part, by a dividend due to him as one-tenth owner of said property under the mortgage made by said Groot, which was allowed as a credit by said Bynum and Grier. The said Bynum and Grier executed a deed in fee simple to said Hovey for the said property, and in return, in addition to the eight thousand five hundred dollars paid by your orator and said Stephenson as aforesaid, took bonds *received* by a deed in trust on the premises for the sum of forty thousand dollars, in three instalments as aforesaid.

And further to demonstrate that the purchase of said Hovey was not made on his own account, or as the highest bidder at an auc-
10 tion sale, but in pursuance of the arrangement previously agreed on for the benefit of your orator and the said Stephenson, your orator shews that on the 3rd day of January, 1859, the said Hovey executed a deed of mortgage to the said Bynum and Grier, conveying all the aforesaid property to indemnify them and the stockholders of the said High Shoal Manufacturing Company against all damage by reason of the said Bynum and Grier having a few days before sold thirteen negro slaves as property claimed under the deed in trust aforesaid, executed by the said Groot; but of which the title was disputed, and against all damage or loss by reason of a suit at law then pending in Catawba County concerning or pertaining to said property; which said deed of mortgage has been duly proved and registered, and a copy thereof, as well as of all the other mesne conveyances hereinbefore mentioned, is deposited in the clerk's office with this bill, for the purpose of reference thereto, and they are prayed to be taken as parts thereof.

Moreover, in order to divest the stockholders of the said High Shoal Manufacturing Company of all further interest in said property, and to

transfer it completely to your orator and the said Stephenson, liable only to the liens of the deed in trust and mortgage aforesaid,
11 as part of the arrangement aforesaid, the several certificates of stock in said company were delivered to your orator and said Stephenson, by which the control of the corperation passed into their hands, and on the 1st day of January, 1861, it ceased to exist for non uses of its franchises for the space of more than two years, according to the statute of the State in such case provided. Your orator further shows that on the 8th day of January, 1859. in order more fully to carry into effect the arrangement already stated with said Hovey, he, the said Aaron E. Hovey, by his deed of that date, did convey to your orator and the said Stephenson, in fee simple absolute, all the aforesaid High Shoal property embraced in the deed aforesaid of the said Bynum and Grier to himself, for the consideration of forty-eight thousand five hundred dollars, as recited in said deed, which had been in part paid, and the balance secured to said Bynum and Grier, as aforesaid, under the agreement previously entered into as aforesaid.

The original of this deed has been mislaid or lost, and your orator cannot now exhibit it in this court, but he produces herewith a true copy thereof, verified by the affidavit of Thomas Darling, one of the subscribing witnesses thereto, which is deposited in the clerk's office
12 with this bill, and is prayed to be referred to as part thereof; and your orator is ready to prove the due execution and delivery of the original as aforesaid.

The aforesaid Thomas Darling was at that time in possession of all the said property as the agent of your orator and the said Stephenson, who then went to their homes in the North, the said Hovey and wife remaining at the High Shoals, the principal place of business on said property, merely as housekeepers for the said Darling.

Your orator further shews that, on the 18th day of December, 1867, the said Eben S. Stephenson, for a full and valuable consideration to him paid and satisfied by your orator, conveyed, assigned, and released all his right, title, and interest in the aforesaid High Shoal property, and every part thereof, to your orator, Theodore Olcott and his heirs, in fee simple, by the deed of the said Stephenson, executed and delivered on that day; which said deed your orator, after causing the same to be duly proved and registered, produces and files in this cause, and prays that it may be referred to as part of this bill; and that, in May, 1868, the said Stephenson departed this life, at his residence in the State of Connecticut, intestate.

13 That the first instalment of one-third of forty-thousand dollars, secured by deed in trust as aforesaid, becoming due on the 1st of January, 1860, the said Bynum and Grier, on the 25th of April, in the same year, after advertisement, the amount thus actually due being about fourteen thousand four hundred dollars, set up at public auction the whole of said property to satisfy that sum, and it was bidden off by the defendant, William Sloan, of Gaston County, as the agent of the said Bynum and Grier, who desired to re-invest themselves with the title at some nominal amount, but no money or other consideration was paid by him, nor was any title, or contract to make title, executed by the said Bynum and Grier to him, nor was any communication had with your orator or the said Stephenson, who were known by the said Bynum and Grier to be the beneficial owners of said property, and through and by means of it solely responsible for the debts secured by said deed in trust.

Whether any, and, if any, what credits were at that time allowed and

entered on the said several debts, amounting in the whole to forty thousand dollars, with interest, two-thirds of which was not then due; or, if such credits were allowed, or entry made, they had any reference
14 to a correspondence with the bid made by the said Sloan at the auction aforesaid; whether there was any excess in the amount of said bid over the sum of fourteen thousand four hundred dollars, then due; and, if so, whether such excess was applied to the other debts not then due or paid over to the said Hovey; whether these other debts were afterwards acknowledged to be satisfied in full out of the proceeds of said alleged sale, or any balance is claimed as yet due, your orator is ignorant, and craves to be informed.

Your orator charges that the transaction was an attempt irregularly to foreclose the lien on said property, not by executing the powers of the trust deed, but by an agreement in pais between the said Sloan and Bynum and Grier, which is simply void against your orater, who is the beneficial owner of the property; that no recourse was had to any court of justice to obtain such foreclosure, as is abundantly shown by the certificates of the clerks and masters in equity for the several counties of Lincoln, Gaston, and Cleveland aforesaid, which are herewith filed; and your orator insists that he is now well entitled to all of the said High Shoals property, beneficially and in equity, subject only to the
15 lien of the deed in trust aforesaid executed by said Hovey for the sums amounting to forty thousand dollars, with interest, which he hereby offers to pay off and discharge under the direction of this court.

Your orator charges that the advertisement and exposure to sale of the whole of said property in solido, at public auction, for cash, on the premises, in a remote and unfrequented neighborhood, when there was then due of the trust or mortgage debt aforesaid not more than the sum of fourteen thousand five hundred dollars at the utmost, was grossly injurious to the rights of himself and the said Stephenson, who were the mortgagees or trustees, in fact, for the same, and, in effect, was equivalent to an assurance to the said trustees and their cestui que trust of the foreclosure of their mortgage or lien at a sum not greater than the mortgage debt. He shews that the said property was easily susceptible of division, and that a fraction of one-fourth, one-fifth, or less, would have readily brought the amount actually due on the day of sale, and would have been within the compass of the means of persons disposed to invest in the same; that the situation of said property is far
16 in the interior of the country, in a section where capital does not abound, where there are divers iron manufactories on a small scale, embracing investments from two to ten thousand dollars, but there was no ground for expecting a purchase of the whole property at a cash sale, unless it were the cestui's que trust, or their trustees for them, they having the whole matter under their own control, and being under no necessity of advancing any money; and the result was a sacrifice of the same at such sum as these parties chose to bid. Your orator is informed, and believes the information to be true, that, at said alleged sale, but a single bid was made, and that by the defendant, William Sloan, but of what sum in money he is ignorant, and craves to be informed; that the entire property was, upon this, knocked down, but no deed was executed or money paid, and possession was soon thereafter taken by said trustees, in their character as such, as aforesaid. No account has ever been rendered by the said trustees to your orator, or to the said Stephenson, of the said sale, or of the application of the monies arising therefrom; the bonds executed at the same time with said deed,

in trust for one-third of forty-thousand dollars each and interest, have never been returned to them, or either of them.

17 Two of these bonds, it is to be observed, were not then due; but your orator believes, and so charges, that in the affair, as conducted by said trustees, the whole was treated as presently due; and that as a consequence of said alleged sale they claimed to hold all of the said property, denuded of any obligation to account to your orator and the said Stephenson as equitable owners of the same; but whether they claim any balance as still due on said deed in trust, or under the mortgage deed aforesaid dated January 3rd, 1859; and whether credits were entered at the date of the sale for the amounts to fall due on the 1st of July, 1860, the 1st of January, 1861, your orator is ignorant, and craves to be particularly informed.

He charges that the course taken was such as, in effect, if not corrected by this court, to deprive him of a property which had been already sold for seventy-five thousand dollars, and was then worth more than that sum, to satisfy a balance of forty thousand dollars and interest, only one third of which was then due and demandable.

As confirmatory evidence that the bid for said property by the said Sloan aforesaid was in the character of agent for said Bynum

18 and Grier, your orator shews that on the 24th of May, 1860, the said Bynum and Grier took from the said Hovey an instrument in writing, which, without the recital of any consideration, purports to surrender to them as trustees, not to said Sloan as purchaser, the entire property and estate known "as the High Shoals," comprising about 14,000 acres of land, &c., &c., according to the purchase made by them on the 28th of April, 1860, and concluding as follows: "I hereby acknowledge myself to hold said land and premises under them, and for their use and benefit, subject to removal at the will and direction of the said trustees." Your orator has filed herewith a copy of this instrument, and prays that it may be referred to as part of this bill.

He shews that the said Hovey was then in destitute circumstances, with no real interest then or at any time in said property, and for the sake of retaining a home on the premises would readily have signed that or any other paper that would effect this object, but that the said Darling was then on the premises, as the agent of your orator and the said Stephenson, and so continued until some time in the year 1861, when being a northern man, he returned to that part of the country in consequence of the breaking out of the civil war. Whether said

19 Darling was informed of the execution of this paper your orator is ignorant. He certainly communicated no knowledge of it to your orator or the said Stephenson.

Your orator further shews that, in consequence of the threatening aspect of affairs in the southern country, and their final result in hostilities, he or the said Stephenson did, not visit North Carolina again until since the close of the war, on the announcement of the Chief Justice of the United States that the Federal courts were again in the exercise of their full jurisdiction in this State.

He now learns that after the departure of the said Darling, the agent of your orator, and the said Stephenson from the property aforesaid and from this State, the said Bynum and Grier took full possession of the said property, and in the year 1862 made a contract in writing to sell the same to the defendant, Robert R. Bridgers, John L. Bridgers, and Powell, in fee simple; that Mr. Powell has since died, leaving a last will and testament in writing, which has been duly proved and allowed, in which the said John L. Bridgers was nominated executor, and he has

qualified as such; that the price agreed to be paid for said
20 property by these parties was the sum of sixty-five thousand dollars, or certain credits, of which your orator is ignorant, and the title was to be retained as a security for the same.

Your orator is advised and believes, and so charges, that a large part of said purchase-money is now due, and is yet unpaid, and that no title-deed has yet been made; that under said contract the said Messrs. Bridgers, Barron and Powell were let into possession, carried on the manufacture of bar-iron, nails, iron-castings, pig-metal, &c., on a large scale, on said property, as well as agriculture, deriving large profits therefrom, till the end of the year 1865; realizing gains to the amount of fifteen thousand dollars per annum, or other large sum.

That in the month of December, 1865 the said joint claimants and partners last named, acting by the aforesaid John L. Bridgers, entered into an executory agreement in writing with the defendant Charles Wilkes, to sell to him the aforesaid property in fee simple, at the price of one hundred and fifty thousand dollars, with interest, on certain terms of credit therein mentioned, viz: Ten thousand dollars on the fifteenth (15th) January, 1866; forty thousand dollars on the 1st February, 1866;
21 fifty thousand dollars on the 1st of July, 1866, and fifty thousand dollars on the 1st of January, 1867; the title to be retained as a security, with a stipulation that when the sum of fifty-thousand dollars and interest should be paid, the said Wilkes should be entitled to a deed in fee simple for said property; he at the same time executing a mortgage deed on the same to secure the balance of the purchase-money the said Robert R. Bridgers retaining the right to take a fifteenth part of the ownership in the said property in his own name, that under this agreement possession was at once transferred to the said Charles Wilkes, who, in the month of January, 1866, commenced operating thereupon, having removed thereto, with his family, from the city of Washington, D. C., where he had previously resided; and he has ever since been engaged in carrying on the iron-works there situate, manufacturing bar-iron, nails, and iron castings, using the ores and timbers, and cord-wood, as well as cultivating crops on said lands, and making great profits, to the amount of fifteen thousand dollars per annum, or other large sum.

Your orator is not advised what part of said purchase-money has been paid, but he is informed and believes, and so charges, that
22 at least one hundred thousand dollars of the same remains unpaid, and that no title-deed has been executed to said Wilkes for said property as yet.

Your orator is advised and insists that all the aforesaid High Shoal property, in the view of equity and justice, as administered in this court, belongs now beneficially to him, subject only to the lien for the sum of forty thousand dollars, with interest from the 1st day of January, 1859, as secured by the deed in trust of that date executed and delivered by the said Aaron E. Hovey to aforesaid William P. Bynum and Thomas Grier, as well by reason of the deed of conveyance aforesaid made by the said Hovey to your orator and the said Stephenson on the 8th of January, 1859, as by the trust arising out of the facts that they made the contract under which the said Hovey became the ostensible purchaser and executed the deed in trust, as well as the mortgage deed aforesaid, the latter bearing date the 3rd day of January, 1859; and that they paid and satisfied the sum of eight thousand five hundred dollars to the said Bynum, in part of the purchase money of said property, and that they were
23 well known to be the real purchasers by the said Bynum and

Grier, and by reason of the conveyance aforesaid from said Stephenson to your orator on the 18th of December, 1867.

He further insists that the aforesaid defendants, the alleged purchasers of said property, since the 1st day of January, 1859, are affected with notice in fact, or in law, by their own want of diligence and inquiry of this equitable title of your orator; that the said Bynum and Grier could not purchase at their own sale as trustees, as alleged to have been made on the 28th day of April, 1860, even through the said Sloan, and even if deeds had been executed from them to him, and him to them, which is not pretended to have been done; and your orator avers that they, the said Bynum and Grier, had express information and notice that Hovey was but a nominal party, and had no interest in the whole transaction; and that your orator and the said Stephenson furnished the money, and were the real purchasers by the deed in which the legal title was conveyed to him. He does not allege that these two defendants had
24 actual knowledge of the deed to your orator and Stephenson, as aforesaid, from said Hovey on the 8th day of January, 1859. Not having sold any interest in said property, as they expected to do when said deed was made, they did not procure the same to be registered then; but your orator avers that it was made bona fide to secure their true interest as stated on its face; and Mr. Bynum and Mr. Grier both had actual knowledge that the aforesaid purchase in Hovey's name was for their benefit, and payed for, so far as payment was made, with their means; and that said Sloan was but an agent of Bynum and Grier, and affected with notice in like manner. He further insists that the said Robert and J. L. Bridgers, Barron, and Powell, and the said Charles Wilkes, if they had not actual notice of the title of your orator and said Stephenson at the times of their respective purchases aforesaid, could readily have procured it upon reasonable inquiry. The registry in the several counties in which the lands in question are situated showed that these lands were under the incumbrance of a deed in trust to said Bynum and
25 Grier from said Hovey which had never been closed; and the alleged instrument of surrender by Hovey had never been registered, if it could have any effect in conveying title. These facts apply with still greater effect to the said Charles Wilkes, who purchased from a party not professing to have the legal title; and he was therefore the more bound to make inquiry into the same.

But your orator is informed and believes that a large part of the aforesaid sum of sixty-five thousand dollars, agreed to be paid by the said Robert and J. L. Bridgers, Barron, and Powell to said Bynum and Grier, in consideration of said property, is still due and unpaid; and he is advised that the afore-named parties now having knowledge of the same, before actual payment to their obligees, are bound, if not to convey said property, to pay any balance due to your orator. What is the amount of such balance, he is ignorant, and craves to be informed. And he further insists that the said Charles Wilkes, yet owing a large balance of one hundred thousand dollars, or more, as he is informed and believes, is bound to pay such balance to him, if he, your
26 orator, shall not be decreed to have a reconveyance of the property aforesaid, on satisfying the said deed in trust of the 1st of January, 1859.

Your orator further avers and states that his interest in the extensive property aforesaid, after satisfying the lien of the said deed in trust, is of far greater value than two thousand dollars, as is manifest from the prices hereinbefore stated, at which the same has been at different times agreed to be sold; and he would have long since taken steps to assert

his rights in the same, but for the occurrence of the war, and the doubt for some time subsequent to its close as to the restoration of the full jurisdiction of the courts of the United States in North Carolina.

Now, to the end, therefore, that the said defendants may, if they can, show why your orator shall not have the relief hereby prayed, and that the said Charles Wilkes, Robert R. Bridgers, B. B. Barron, John L. Bridgers, in his own right, and as executor of Powell, deceased, William P. Bynum, Thomas Grier, W'm Sloan, and Aaron E. Hovey may, upon their several and respective corporal oaths, and ac-
27 cording to the best and utmost of their several and respective knowledge, information, and belief, full, true, direct, and perfect answer make to all the allegations herein made, as fully and particularly as if the same were repeated, and they were severally and specially interrogated thereunto; that the right of your orator to a conveyance of all the High Shoal property aforesaid, upon satisfying the lien of forty thousand dollars, with interest, created by the deed in trust from the said Hovey to Bynum and Grier, dated the 1st of January, 1859, (which your orator here again repeats his readiness to do,) may be declared by this court, and a decree made accordingly; that an account may be taken of the rents and profits received by the said Robert and J. L. Bridgers, Barron, and the estate of the said Powell; and a like account of the rents and profits received by the said Charles Wilkes out of said property, during their occupation and enjoyment thereof by the parties respectively, and that the same, when ascertained, may be decreed to be paid to your orator; and, if it shall be found by the court that either of the several sets of purchasers of the aforesaid property were
28 not affected with notice of the rights of your orator, at the time of their respective purchases, but that there is yet a balance of purchase-money still owing from any of said sets of purchasers, that the same may be credited to, and allowed and paid to your orator, after the satisfaction of said lien of forty thousand dollars and interest thereon as aforesaid; and that your orator may have such other and further relief as his case shall require, and may entitle him unto: May it please your honors to grant to your orator writs of subpœna, to be issued to the said Charles Wilkes, Robert R. Bridgers, B. B. Barron, John L. Bridgers, in his own right, and as executors of the aforesaid Powell, deceased, William P. Bynum and Thomas Grier, William Sloan and Aaron E. Hovey, commanding them and each of them, by a certain day, under a certain penalty therein to be inserted, to be and appear before your honors in this court, then and there to answer the premises, and further to stand to, abide by, and perform such order and decree therein as shall be agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, &c.

April 2nd, 1868.

W. A. GRAHAM,
Sol. for Pl'ffs.

29 EXHIBIT A.

This indenture, made the 24th day February, in the year of our Lord one thousand eight hundred and fifty-four, between the High Shoal Manufacturing Company, a corporation created by and under authority of an act of the legislature of the State of North Carolina, by Andrew Hoyle, president of said company, acting under and in pursuance of resolutions recently passed by the stockholders and directors of said company, party of the first part, and Philip W. Groot, of the city of Albany and State of New York, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of seventy-five thousand dollars, to the said company in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath given, granted, bargained, sold, aliened, and conveyed, and doth by these presents give, grant, bargain, sell, alien, and convey, unto the said party of the second part, in his actual possession now being, and to his heirs and assigns forever, the several tracts, pieces, and parcels of land hereinafter mentioned and described,
30 the first of which is a large tract of land situate in the counties of Gaston and Lincoln, State of North Carolina, commonly called the High Shoals property, bounded and described as follows, to wit:

Begin'ing at a large birch on the north bank of the south fork of the Catawba River; thence north 17° east, 41 poles, to a post oak; thence north 83° east, 182 poles, to a red-oak; thence north 2° east, 141 poles, to a stone; thence north 75° west, 107 poles, to a post-oak stump, Friday's corner; thence north 56° east, 13 poles, to a chesnut; thence north 80° west, 18 poles, to a post-oak; thence north 63° west, 100 poles, to a red-oak; thence north 29° east, 92 poles, to a black-oak, Friday's corner; thence north 64° west, 6 poles. to a red-oak; thence north 32° west, 10 poles, to a red-oak, O'Brian's corner; thence along his line, north 81° west, 181 poles, to a black gum, his beginning corner; thence north 140 poles, to pointers; thence east 202 poles, to a post-oak, Carpenter's corner; thence north 39° west, 16 poles, to a black-oak; thence north 84 poles, to a black gum; thence north 74° west, 114 poles, to a post-oak; thence north 16° east, 62 poles, to a post-oak, beginning corner of 350-acre tract; thence north 75° west, crossing the Lincoln road, 221 poles, to pointers; thence north 16° west, 144 poles, to a white-oak, near a branch; then west 56 poles, to a rock; thence the same course, 10 poles, to a stake; thence south 32° west, 100 poles, to a stake; thence north 62° west, 64 poles, to a stake; thence
31 north 27° east, 62 poles, to a stake; thence north 70° west, 119 poles, to a black-oak; thence west 20 poles, to a chestnut; thence north 60° west, 31 poles, to a stake ×; thence south 4° east, 315 poles, to a large pine, Shuford's corner; thence south 9° west, 53 poles, to a persimmon on the bank of the south fork; thence crossing the south fork south 9° west, 20 poles, to a stake in the south bank of the south fork; thence up the river, north 82° west, 58 poles, to a stake; thence south 53° west, 56 poles, to an elm; thence north 61° west, 42 poles, to a stake; thence north 74° west, 24 poles, to a stake; thence north 66° west, 30 poles, to a stake; thence north 76° west, 12 poles, to a stake at the mouth of Beaver Dam Creek; thence up it; thence south 37° west, 42 poles, to a forked white-oak, Carpenter's corner; thence south 72° east, 165 poles, to a stake; thence north 44° west, 160 poles, crossing said branch, to a large white-oak on the bank of said branch; thence south 72° to a stone and pointers; thence south 66 poles to a post-oak, Daniel Carpenter's corner; thence with his line south 56° west, 49 poles, to a hickory, Carpenter's corner; thence south 23° W., 55 poles, to a dead pine, Carpenter's corner; thence with his other line south 42° west, 25 poles, to a post-oak, Daniel Carpenter's corner; thence north 74 west, 78 poles, to a dead white-oak, corner of Jacob Carpenter's 30-acre tract; thence north 21° west, 54 poles, to a stake, south 74 west, 32 poles; thence south 48° east, 12 poles, to a stake; thence south 74° west, 65 poles, to a stake; thence south 9 poles, to a stake; thence south 82° east, 93 poles, to a stake; thence 20° west, crossing Mountain Branch, 198 poles, to a
32 Spanish oak, Carpenter's corner; thence south 25° west, 40 poles,

his corner, to a post-oak in Kizer's land; thence with Kizer's line south 82° east, 16 poles, to a stake and pointers, Kizer's corner; thence south 17° west, 6 poles, to a post-oak corner, of the bounty land; thence with the line of the bounty land south 11° west, 124 poles, to a stake, Clark's corner; thence north 89° west, 144 poles, to a pine; thence along Jacob Kizer's line north 65° west, 144 poles, to a black-oak, his corner; thence south 24° west, 78 poles, to a post-oak; thence south 75° east, 175 poles, to a stake in Mountain Branch; thence south 53° east, 10 poles, to a stake; thence south 28° west, 50 poles, to a pine; thence north 59° west, 25 poles, to a sweet gum, the begin'ing corner of the Hayne tract; north 74° west, 140 poles, to a pine, the fourth corner of Hayne's tract; thence south 37½° west, 180 poles, to a dead post-oak; thence south 78° west, 31 poles, to a Spanish oak, corner of the bounty land; thence along the line of said land *thence* south 10° west, 411 poles, to a post-oak, Crosse's corner; thence S. 18° west, 61 poles, to a pine, (now down,) John Fromberger's corner; thence with his line south 7° east, 60 poles, to a pine; thence with another of his lines south 70 east, 84 poles, to a black gum; thence south 3° east, 100 poles, to a pine stump and large black-oak, his corner to Bates' tract; thence south 70° west, 58 poles, to a pine; thence south 68 poles, to a stake; thence south 56° east, 28 poles, to a black-oak; thence south 13° west, 140 poles, to a stake and pointers; thence south
51° east, 218 poles, to stake on Blackwood's old line; thence
33 with it north 66° east, 52 poles, to a post-oak; thence south 24° east, 92 poles, to a small red-oak, his corner; then north 66° east, 40 poles, to a white-oak, crossing a large branch; then south 2° east, 84 poles, to a white-oak; thence south 65 west, 9 poles, to a Spanish oak on the old line; then along it, through the head of the furnace pond, south 24° east, crossing the creek three times, 84 poles, to a dead post-oak; thence south 66° west, 135 poles, to a post-oak, Blackwood's corner; thence north 24° west, 198 poles, to a stake; thence south 66° west, 112 poles, to a stake; thence north 34° west, 120 poles, to a stake; thence south 22° west, 237 poles, to a stake, pile, & pointers, Dick's corner; thence south 8° west, 24 poles, to a gum; thence S. 60° east, 23 poles, to a chestnut; thence south 34° west, 204 poles, to a Spanish oak; thence south 39¾° west, 85 poles, to a small post, George Kizer's corner; thence south 50° east, crossing a small drain, 16 poles, to a stake & pointers, where a black-oak stood; thence south 37° west, 245 poles, to a double post-oak; thence north 37° west, 203 poles, to a black-oak; thence north 20° west, 98 poles, to a stake on Torrence's land; thence north 85 west, 104 poles, to a chestnut; thence south 22° west, 64 poles, to a stake; thence north 85 east, 25 poles, to a small white-oak, Ormand's corner; thence south 9° west, with Ormand's line, 103 poles, to a small post-oak, stump, & pointers on the bank of an old ore-hole, thence south 20 poles, to a black-jack, near Ormand's
ore-bank; thence south 89 east, 104 poles, to a chestnut in
34 the line of 500-acre tract, John White's corner; thence south 1° west, 171 poles, to a post-oak, J. White's corner, on Ormand's line; thence south 1 west, 101 poles, to a black-jack; thence south 59° east, 42 poles, to a post-oak, Ormand's corner; thence south 3° east, 132 poles, to a large black-oak; thence north 70° east, 74 poles, to a black-oak; thence north 29° W., 44 poles, to a chestnut-oak, in a hollow, by the side of an old road; thence north 41 east, 60 poles, to a pine, Blackwood's corner; thence with his line north, 19 west, 64 poles, to a pine, on a ridge, Blackwood's corner; thence north 72° east, 144 poles, to a dead pine & pointers in a glade, near a small drain; thence north 61°

east, 90 poles, to a stake & pointers, Samuel Wilson's corner; thence south 19° east, 54 poles, to a stake, Wilson's corner; thence with his line north, 62° east, 74 poles, to a black-jack, W'm McGill's corner; thence south 24° east, 83 poles, to a poplar; thence south 45° east, 4 poles, to a pine stump & pointers; thence north 54° east, 8 poles, to a post-oak, corner of the 12-acre tract; thence along Abernethy's line south 74° east, 95 poles, to pointers; thence north 14° east, 57 poles, to a black-oak, in the bank of Ferguson's branch; thence north 35° west, 42 poles, to a black-oak, Furguson's corner; thence north 53° east, 92 poles, to a chestnut, the begin'ing corner of the Blackwood tract; thence south 38° east, 9 poles, to a post-oak, Furguson's corner; thence north 84½° east, 172 poles, to a white-oak; thence south 49½° east, 84 poles,
35 to a post-oak, on a ridge; thence north 13° east, 117 poles, to a large black gum, Blackwood's corner; thence north 5½° east, 26 poles, to a chestnut, Blackwood's corner; thence north 60° east, 14 poles, to a small black-oak, Blackwood's corner; thence south 18 east, 162 poles, to a stump; thence north 26½° east, 136 poles, to a pine, Oates' corner; thence north 31° west, 87 poles, to a white oak, Oates' corner; thence north 61° east, 20 poles, to Mason's corner; thence with Mason's line north 12° west, 223 poles, to a chestnut, Mason's corner; thence north 81 east, 114 poles, to a post-oak; thence south 15 east, 90 poles, to a stake on Mason's line; thence north 71 east, 98 poles, to a poplar, on a small branch; thence with Sarvice's line south 18 east, 36 poles, to a post-oak; thence north 41 east, 58 poles, to a post-oak, Crawley's corner; thence north 4 west, 71 poles, to a stake, Holland's line; thence south 72½ west, 41 poles, to a black-oak, Holland's corner; thence north 61½ west with Holland's line, 149 poles, to a stake; thence north 52½ west, 47 poles, to a Holland's corner; thence north 22 west, 77 poles, Holland's corner; thence north 88 east, 39 poles, Holland's corner; thence north 51 east, 79 poles, Holland's corner; thence north 70 east, 21 poles, Holland's corner; thence south 71 east, 52 poles, to a black-oak stump and pointers; thence 17 east, 87 poles, to a black-oak; thence north 87 east, 38 poles, to a hickory, Costner's corner; thence north ½ east, 146 poles, to a dead hickory, in Best's field; thence north 60 west, 34
36 poles, to a stake and pointers, at the edge of the bottom of Long Creek; thence north 30 east, 30 poles, to a post-oak, in the corner of Best's field, below the furnace; thence north, 64 west, 148 poles, to a hickory on the west bank of Long Creek; thence with the meanders north 17 west, 18 poles, up the creek; thence north, 18 poles; thence north 40 west, 21 poles; thence north 63 east, 30 poles; thence north 21 east, 25 poles; thence north 73 west, 18 poles, to a stake and pointers in the north bank of Long Creek, Michel Rhymis' corner formerly, now Shethy's corner; thence north 12 east, 47 poles, to a stake and pointers, at the edge of the road leading from the furnace to the forge; thence north 51 east, 35 poles, to a chestnut at the edge of the road; thence north 40 east, 43 poles, to a stake and pointers on the south side of the road, near Shethy's fence; thence north 24 east, 17 poles, to a gate-post in the lane—the widow Froneberger's lane; thence with her line north 62 west, 64 poles, to a pine, her corner; thence north 30 east, 142 poles, to a post-oak, her corner, in the widow Ramsey's line; thence north 9 east, 79 poles, to a hickory, the widow Ramsey's corner; thence 34½ east, 97 poles, to a black-oak, her corner; then north 33 east, 115 poles, to a Spanish oak, on a bluff, on the south side of a branch; thence north 57 west, 141 poles, to a red-oak, by a little glade; thence north 3 east, 92 poles, to a large Spanish oak, near Daniel Pasour's corner;
37 thence with another of his lines passing between his house and

barn north 32 east, 192 poles, to a chestnut, his and George Pasour's corner; thence 62 west, 60 poles, to a stake, Pasour's corner; thence north 32 east, 140 poles, to a chestnut, Pasour's corner; thence south 62 E., 60 poles, to Pasour's other corner; thence north 29 east, 61 poles, to a post-oak, marked F. Crope's corner; thence north 24 east, 139 poles, to a stake and pointers, Crope's corner; thence with his line south 72 east, 134 poles, to a stake, David Costner's corner; thence north, 37 poles, to his other stake corner; thence north 50 west, 23 poles, to a pine stump and pointers, Jacob Summey's corner; thence north 42 west, 37 poles, to a small post-oak, his and Joshua Carpenter's corner; thence north 52 west, 174 poles to a Spanish oak; thence north 38 east, 74 poles, crossing two branches, to a small dead black-oak, Joshua Carpenter's corner; thence south 49½ east, 58 poles, crossing a branch to a small white-oak, Carpenter's corner; thence north 31½ east, 207 poles, to a small maple at the head of a branch; thence with Jacob Summey's line north 64½ east, 128 poles, to a sour-wood, on a little branch; thence south 70 east, 72 poles, to a post-oak, on the furnace; thence south 25 east, 68 poles, to a red-oak, Summey's corner; thence south 82 east, 14 poles, to a dead post-oak in the field; thence north 59 east, 36
38 poles, to a stone corner; thence north 29 east, 254 poles, to the South Fork, the begin'ing corner, containing, by estimation, fourteen thousand two hundred and fifty acres, be it the same more or less.

Also one other tract of land lying in the county of Gaston, State of North Carolina, adjoining lands of James H. White, W'm Shethy, Lawson Mauney, and others, and begin'ing at a stake on the great road leading from Dallas to the Furnace, and runs thence north 9 west, 198 poles, to a stake on W'm Shethy's line; thence with his and Thomas Ramsey's north 1 east, 105 poles, to a black-oak stump, Ramsey's corner; thence north 72 west, 16 poles, to a stake, where the old hickory stood; thence north 27 east, 83 poles, to a large black-gum; thence north 32 east with Lawson Mauney's line, 98 poles, to a white-oak, down the original begin'ing corner of Adam Costner's tract; thence with Ma'ney's line south 53 east, 28 poles, to a rock and chestnut-oak, his and Valentine Costner's corners; thence with Costner's line south 42 east, 116 poles, to a stake on Plank's line; then with his line north 65 west, 54 poles, to a post-oak, on the east side of the York road, his corner; thence with his and Clemmer's line south 1 west, 197 poles, to the begin'ing, containing, by estimation, one hundred and seventy-nine , be it the same more or less.

39 Also, one other tract of land lying in the said county of Lincoln, known as the Gold-Mine Lot, on the waters of Michel's Creek; begin'ing at a black-oak on the east side of Tookasege Ford road, at the corner of Bolin F. Hirley's farm; and runs thence, with the line of the Gold-Mine tract, south 31° west, 229 poles, to a white-oak stump & pointers; thence south 76° east, crossing a small branch, 39 poles, to a post-oak—Isaac Clantan's corner; thence, with his line north 22 east, 42 poles, to a hickory—Clantan's corner; thence north 81° east, 32 poles, to a post-oak on the south side of Vertel's Ford road; thence with another of his lines north 5° west, 22 poles, to a small black-oak on the north side of said road; thence along said road north 17° east, 50 poles, to a black-oak on the south side of said road—Clantan's & Kirby's corner; thence on the same corner, 47½ poles, to a black-oak—Kirby's corner; thence, with another of his, along the road north 5° east, 50 poles, to the begin'ing, containing by estimation forty-four and a half acres, be it the same more or less.

Also one other tract lying in the county of Cleaveland and State of

North Carolina, known as the lime quar'y, furnishing lime to the Columbia furnace, adjoining the lands of James B. Folls, Benjamen F. Briggs, and others, containing about four hundred acres, be it the same more or less; and also all other lands owned or possessed by the
40 said party of the first part, if any are not included in the foregoing descriptions, together with all and singular the mines, minerals, or manufactures, furnaces, mills, bu'ldings, machinery, and other things on or in anywise appertaining to said property, and all and singular the hereditaments and appurtenances to the said several parcels of land belonging or in anywise appertaining; all the tools, implements, machinery, machines, and other property now on the said premises, or in any way connected with the use of the same.

To have and to hold the said several pieces, parcels, and tracts of land and other property, with the hereditaments and appurtenances, to the said party of second part, to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever.

And the said High Shoals Manufacturing Company does hereby covenant and agree to and with the said party of the second part, his heirs, executors, administrators, and assigns, that the said company will, when requested, execute and deliver all such further deeds, conveyances, instruments, and assurances, except covenants for title, as may be deemed necessary or proper for the purpose of more perfectly conveying and assuring all and singular the lands and other prop-
41 erty aforesaid to the said party of the second part, his heirs and assigns forever.

It in witness whereof, the said corporation having no county seal, has caused these presents to be executed by its said president, by subscribing his name and affixing his seal.

AND. HOYL, *President.*

Attest: C. R. Z. CROWNLAND.

FEBRUARY 10th, 1868.

STATE OF NORTH CAROLINA, *Gaston County:*

I, A. M. Ford, register for said county, do hereby certify that the foregoing is a true copy of the deed from And. Hoyl to Phillip W. Groot, as on record in my office.

Witness:

A. M. FORD,
Register.

42 *Deed from Groot to Hoyl, dated 24th February,* 1854.

This indenture, made the 24th day of February, in the year of our Lord one thousand eight hundred and fifty-four, between Phillip W. Groot, of the city of Albany and State of New York, of the first part, and Andrew Hoyl, of the county of Gaston in the State of North Carolina, president of the High Shoals Manufacturing Company, and in trust for the late stockholders thereof, party of the second part.

Whereas, the said party of the first part is justly indebted to the said of the second part in the sum of fifty thousand dollars, lawful money of the United States of America, secured to be paid by a certain bond or obligation, bearing even date with these presents, in the penal sum of one hundred thousand dollars, lawful money, as aforesaid, conditioned for the payment of the said first-mentioned sum of fifty thousand dollars, in manner following, to wit: Twenty-five thousand

dollars on the first day of March, 1855, with interest thereon of six per centum per annum from the first day of March next, and the remaining sum of twenty-five thousand dollars on the first day of September,
43 1855, with interest thereon as aforesaid, as by the said bond or obligation and the conditions thereof, reference being thereunto had, may more fully appear.

Now, this indenture witnesseth that the said party of the first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all and singular the lands, tenements, hereditaments, and other property situate in the county of Gaston, Lincoln, and Cleveland, in the said State of North Carolina, mentioned and described in a deed bearing even date herewith, executed by the said High Shoals Manufacturing Company to the said party of the first part, reference to which said deed is hereby had and made for a more full and perfect description of said premises, together with all and singular the tenements, her-
44 editaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversions and reversion, remainder and remainders, rents, issues, and profits thereof, and also the estate, right, title, property, possessions, claims, and demands whatsoever, as well in law as in equity, of the said party of the first part, of and to *hold* the above granted and described premises with the appurtenances; to have and to hold the above granted and described premises with the appurtenances, unto the said party of the second part, his heirs and assigns, to his own and their own proper use, benefit, and behoof forever.

Provided always, and these presents are upon this express condition: that if the said party of the first part, his heirs, executors, or administrators shall well and truly pay unto the said party of the second part, his executors, administrators, or assigns, the said sum of money mentioned in the condition of said bond or obligation, and the interest thereon at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine, and be void, and the said party of the first part, for himself, his heirs, executors, administrators, does covenant and agree to pay unto the said party of the second part, his executors, administrators, or assigns, the said sum of money and interest, as mentioned above, and expressed in the
45 condition of the said bond; and if default shall be made in the payment of the said sum of money above mentioned or the interest that may grow due thereon, or of any part thereof, that then, and from thenceforth, it shall be lawful for the said party of the second part, his heirs, executors, administrators, and assigns, to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said party of the first part, his heirs, executors, administrators, or assigns therein, at public auction, according to the act in such case made and provided, and as the attorney of the said party of the first part, for that purpose by these presents duly authorized, constituted, and appointed to make and deliver to the purchaser or purchasers

thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertisements, and sale of the same premises, rendering the overplus of the purchase-money, if there any shall be, unto the said party of the first part, his heirs, executors, administrators, or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law & equity,
46 against the said party of the first part, his heirs and assigns, and all other persons claiming or to claim the premises or any part thereof by, from, and under him, them, or either of them.

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

This mortgage is given to secure a part of the purchase-money for the property therein mentioned.

PHILIP W. GROOT. [SEAL.]

Sealed and delivered in presence of—
JAMES W. OSBORNE, *Ack.*
FREDRICK GOODELL, *Attest.*
C. R. F. CRONLAND, *Jurat.*

MARCH 15th, A. D. 1854.

STATE OF NORTH CAROLINA, *Gaston County:*

The execution of the within mortgage was the date above proven before J. G. Hand, clerk of Gaston County court, by the oath of C. R. F. Cronland, is recorded, &c.

Witness: J. G. HAND, *C. C. C.*

STATE OF NORTH CAROLINA, *Gaston County:*

I, Aug's M. Ford, register of said county, do hereby certify that the above & foregoing is a full and perfect copy of a mortgage-deed from Philip W. Groot to Andrew Hoyle, president of the High Shoal Manufacturing Company, as registered in this office.

Given under my hand & this the 10th day of Feb'y, A. D. 1868.

AUG'S M. FORD, *Reg'r.*

47 *Deed from Bynum and Grier to Aaron E. Hovey, dated 1st January,* 1859.

This indenture, made the first day of January, in the year of our Lord one thousand eight hundred and fifty-nine, between W'm P. Bynum, of the county of Lincoln, State of North Carolina, and Thomas Grier, of the State of South Carolina, executors of Andrew Hoyl, deceased, trustee of the High Shoal Manufacturing Company, party of the first part, and Aaron E. Hoovey, of the county of Gaston and State of North Carolina, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of twenty-eight thousand five hundred dollars, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath given, granted, bargained, sold, aliened, and conveyed, and doth by these presents give, grant, bargain sell, alien, and convey unto the said party of the second part, in his actual possession now being, and to his heirs and assigns forever, the several tracts, pieces, and parcels of land known as

the High Shoals land, situated in Gaston, Lincoln, and Cleaveland Counties, in the State of North Carolina, upon the waters of the south fork of the Catawba River, Long Creek, and other streams,
48 containing, by estimation, fourteen thousand eight hundred and seventy-three and a half acres, be same more or less, (for a more complete and perfect description of said lands by metes and bounds, reference is hereunto had and made to a deed of conveyance made from the High Shoals Manufacturing Company to Philip W. Groot, which said deed bears date the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and fifty-four, and is recorded and registered in the county of Gaston, in book No. 1, page 696 to 702, also recorded and registered in the county of Lincoln, in book No. 42, page 387 to 391;) and also all the other lands owned or possessed by the said party of the first part, if any are not included in the foregoing description, together with all and singular the mines, minerals, ores, manufactures, furnaces, mills, buildings, machinery, and other things on or in anyways appertaining to said property; and all and singular the hereditaments and appurtenances to the said several parcels of land belonging or in anywise appertaining, and all the tools, implements, machinery, machines, and other property now on the said premises, or in any way connected with the use of the same: To have and to hold the said several pieces, parcels, and tracts of lands, and other
49 property, with the hereditaments and appurtenances, to the said party of the second part, to the sole and only use, benefit, and behoof of the said party of the second part, his heirs and assigns forever.

And the said party of the first part doth hereby covenant and agree to and with the said party of the second part, his heirs, executors, administrators, and assigns, that the said party of the first part, when requested, execute and deliver all such further deeds, conveyances, instruments, assurances, except covenants for titles, as may be deemed necessary or proper for the purpose of more perfectly conveying and assuring all and singular the lands and other property aforesaid to the said party of the second part, his heirs and assigns forever.

In witness whereof the party of the first part hereunto affixed their hands & seals the day and year first above written.

WILLIAM P. BYNUM.
THOMAS GRIER,
By W'M P. BYNUM, *Agt.* & *Att'y.*

BENJAMIN H. SUMNER, *Test.*
THOMAS DARLING, *Jurat.*

STATE OF NORTH CAROLINA, *Gaston County:*

I, A. M. Ford, register for said county, do hereby certify that the above is a true copy of the deed from W'm P. Bynum & Tho's Grier to Aaron E. Hoovey, as on record in my office.

Given under my hand & seal this the 10th day of Feb'y, 1868.

A. M. FORD, *Re'sg'r.*

50 *Deed from Hovey to Bynum & Grier, dated 1st January, 1859.*

This indenture, made the first day of January, in the year one thousand eight hundred and fifty-nine, between Aaron E. Hovey, of the county of Gaston, and State of North Carolina, party of the first part, and William P. Bynum and Thomas Grier, in trust for the stockholders of the High Shoal Manufacturing Company, party of the second part:

Whereas the said party of the first part is justly indebted to the party of the second in the sum of forty thousand dollars, lawful money of the United States of America, secured to be paid by a bond or obligation bearing even date with these presents, in the penal sum of eighty thousand dollars, lawful money as aforesaid, conditioned for the payment of the said first-mentioned sum of forty thousand dollars, in the manner following, to wit: thirteen thousand three hundred and thirty-three dollars and thirty-three cents on the first day of January, 1860, with interest thereon at 6 per centum per annum from the first day of January, 1859; the second instalment of thirteen thousand three hundred and thirty-three dollars and thirty-three cents on the first
51 day of July, 1860, with interest thereon as aforesaid; the third and last instalment of thirteen thousand three hundred and thirty-three dollars and thirty-three cents on the first day of January, 1861, with interest thereon as aforesaid; as by the said bond or obligation and the condition thereof, reference being thereunto had, made more fully appear:

Now this indenture witnesseth that the said party of the first part, for the better securing the payments of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon according to the true intent and meaning thereof; also for and in consideration of the sum of one dollar, to him in hand paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second part, and to their heirs and assigns forever, all and singular the lands, tenements, hereditaments, and other property situate in the counties of Gaston, Lincoln, and Cleveland, in the State of North Carolina, mentioned and described in a deed bearing even date herewith, executed by the party of the second part to the said party of the first part, reference to which said deed is hereby had and made for more full and perfect description of said premises, together with all and singular the tenements, hereditaments, and
52 appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right and title, and interest, property, possession, claim, and demand whatsoever, as well in law as equity, of the said party of the first part, of, in, and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold the above granted and described premises, with the appurtenances thereunto belonging, unto the said party of the second part, their heirs and assigns, to their own proper use and behoof forever.

Provided always, and these presents are upon the express condition that, if the said party of the first part, his heirs, executors, or administrators, shall well and truly pay unto the said party of the second, their executors, administrators, or assigns, the said sum of money mentioned in the conditions of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said conditions, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine, and be void. And the said party of the first part, for himself, his heirs, executors, and administrators, does covenant and agree to pay unto the said party of the second part, their executors, administrators, or assigns, the said sum of money and interest, as mentioned above and expressed in
53 the condition of the said bond, and if default shall be made in

the payment of the said sum of money above mentioned, or the interest that may grow due thereon, or of any part thereof, that then, and upon the failure of the party of the first part to pay the first or any subsequent instalment, as hereinbefore specified, it shall be lawful for the said party of the second part, or either of them, their heirs, executors, or administrators, or assigns, to enter in and upon all and singular the premises hereby granted or intended to be, and to sell and dispose of the same, and all benefits and equity of redemption of the said party of the first part, his heirs, executors, administrators, or *or* assigns therein, at public auction, according to the act in such cases made and provided, and as the attorney of the first part for that purpose, by these presents duly authorized, constituted, and appointed to make and deliver to the purchaser or purchasers thereof a good and sufficient deed, or deeds of conveyance in the law for the same, in fee simple; and, out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with the costs and charges of advertising and sale of the same premises, rendering the overplus of the purchase-money, if any there shall be, unto the said party of the first part, his heirs,
54 administrators, or assigns, which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said party of the first part, his heirs and assigns, and all other persons claiming, or to claim the premises, or any part thereof, by, from, or under him, them, or either of them.

In witness whereof the parties of these presents have interchang'ably set their hands and seals the day and year first above written.

This mortgage is given to secure a part of the purchase-money for the property therein mentioned.

AARON E. HOVEY. [SEAL.]
W. P. BYNUM. [SEAL.]
THO'S GRIER, [SEAL.]
By W. P. BYNUM, *Ag't & Atto.*

Test:
BENJ. H. SUMNER.
THOMAS DARLING, *Jurat.*

55 *Deed from Hovey to Bynum & Grier, dated 3rd January*, 1859.

This indenture made and entered into this third day of January, A. D. 1859, between Aaron E. Hovey, of Gaston County, North Carolina, of the first part, and William P. Bynum and Thomas Grier, executors of A. Hoyl, in trust for the High Shoals Manufacturing Company, of the second part, witnesseth:

That the party of the first part, for and in consideration of one
56 dollar in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and the further consideration hereafter named, hath bargained, sold, aliened, and confirmed, and doth hereby bargain, sell, alien, and confirm unto the party of the second part, and to their heirs and assigns forever, the several tracts, pieces, and parcels of land known as the High Shoals Lands, situated in Gaston, Lincoln, and Cleveland Counties, North Carolina, upon the waters of South Fork River, Long Creek, and other streams, (for a more full and perfect description of said lands, by metes and bounds, reference is hereunto had and made to a deed of conveyance made from the High Shoal Manufacturing Company to Philip W. Groot, which said deed bears date the 24th day of February, 1854, and is recorded and

registered in the county of Gaston, and State of North Carolina, in book No. 1, page 696 to 702, and also registered in the county of Lincoln, in book No. 42, page 387 to 391,) and also all other land owned or possessed by the party of the first part, if any are not included in the foregoing descriptions, together with all and singular the mines, minerals, ores, manufactures, furnaces, mills, buildings, machinery, and other things in or in any way appurtaining to said property, and all and singular the hereditaments and appurtenances to the said several pieces of
57 land, belonging or in anywise appertaining, and all the tools, implements, and other property now on the said premises, or in anywise connected with the use of the same: To have and hold the aforesaid lands and premises, hereditaments, and other property before named to the party of the second part, their heirs, executors, and administators forever.

On condition, nevertheless, that whereas the party of the second part, on the 28th December, 1858, by virtue of a mortgage made by P. W. Groot to And. Hoyle and his executors, in trust for the High Shoal Manufacturing Company, sold at public auction thirteen negroes, slaves, and applied the proceeds thereof, being nine thousand one hundred and sixty dollars, to the payment of the old debt secured by said mortgage; and whereas a claim, or pretence of claim, is made to said negro slaves so sold and applied, adverse to the claims of the party of the second part, acting by and under the authority of said mortgage, in the sale as above, had and made; now, if the said party of the first part shall well and truly indemnify and save harmless from all loss, harm, and liability the said party of the second part, their heirs and executors, and also save harmless from all loss and liability the stockholders of said High Shoals Company, by reason of all claim and pretense of claim by
58 James W. Osborne and Emma Graham, or their or either of their assigns, had and made to said negro slaves so sold and applied, and also if the said party of the first part shall indemnify and save harmless the said party of the second, and the stockholders of said company, as aforesaid, from all liability which may occur to them, or loss which they may sustain at a suit in law now pending in Catawba County, brought in the name of Andrew Hoyle against David Froneberger, Oats, & others, which said suit was brought for the benefit of the property conveyed to the party of the first part, then this conveyance shall be void, and said party of the second part shall convey to the party of the first part the lands and premises herein conveyed to said party of the second part; otherwise, this conveyance to be and remain in full force & effect.

In witness whereof the party of the first part has hereunto affixed his hand and seale the day & date above named.

AARON E. HOOVEY. [SEAL.]

Test: BENJ. H. SUMNER.

STATE OF NORTH CAROLINA, *Gaston County:*

I, A. M. Ford, register for said county, do hereby certify that the above is a correct copy of the trust deed from Aaron E.
59 Hoovey to William P. Bynum and Thomas Grier, as on record in my office.

Given under my hand and seal this 10th day of February, 1868.

Witness:

A. M. FORD, *Reg'r.*

[*In lead-pencil :*] Copy of the paper offered in evidence & rejected.

Deed of Hovey to Stephenson & Olcott, dated 8th January, 1859.

This indenture, made the eighth day of January, in the year of our Lord one thousand eight hundred and fifty-nine, between Aaron E. Hovey, of the county of Gaston, and State of North Carolina, party of the first part, and Eben. S. Stephenson and Theodore Olcott, of the city and county and State of New York, parties of the second part, witnesseth :

That the said party of the first part, for and in consideration of the sum of forty-eight thousand five hundred dollars to the said party of the first part in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, hath given, granted, bargained, sold, aliened, and conveyed, and doth by these presents, give, grant, bargain, sell, alien, and convey unto the said parties of the second part, in their actual possession now being, and to their heirs and assigns forever, the several tracts, pieces, and parcels of land, known as the High Shoals lands, situated in Gaston, Lincoln, and Cleveland Counties, in the State of North Carolina, upon the waters of the south fork of the Catawba River, Long Creek, and
61 other streams, containing, by estimation, fourteen thousand eight hundred and seventy-three and a half acres, be the same more or less, (for a more complete and perfect description of said lands by metes and bounds, reference is hereto had and made to a deed of conveyance from the High Shoals Manufacturing Company to Philip W. Groot, which said deed bears date the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and fifty-four, and is recorded and registered in the county of Gaston, in book No. 1, page 696 to 702; also recorded and registered in the county of Lincoln, in book No. 42, page 387 to 391;) and also all other lands which were conveyed, or intended to be conveyed, to the said party of the first part by William P. Bynum and Thomas Grier, executors of Andrew Hoyl, deceased, trustee of the High Shoals Manufacturing Company, a corporation created by the legislature of North Carolina, by deed bearing date the first day of January, one thousand eight hundred and fifty-nine, reference to which said deed is hereby had and made, together with all and singular the mines, minerals, ores, manufactures, furnaces, mills, buildings, machinery, and other things on, or in any way appertaining to said property, and all and singula' the hereditaments and ap-
62 purtenances to the said several parcels of land belonging, or in anywise appertaining; and all the tools, implements, machinery, machines, and other property now on the said premises, or in any way connected with the use of the same: To have and to hold the said several pieces, parcels, and tracts of land, and other property, with hereditaments and appurtenances, to the said parties of the second part, to the sole and only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns, forever; subject, nevertheless, to a mortgage on the said property, executed by the said party of the first part, on the first day of January, one thousand eight hundred and fifty-nine, to William P. Bynum and Thomas Grier, in trust for the stockholders of the High Shoals Manufacturing Company, in the State of North Carolina, for securing the payment of forty thousand dollars with interest.

And the said party of the first part, for himself, his heirs, and personal representatives, does hereby covenant and agree to and with the

said parties of the second part, their heirs and assigns, that the said party of the first part is now seized of a good, sure, and indefeasible estate in fee simple, absolute, of and in all and singular the lands, tenements, and hereditaments above mentioned, and every part and
63 parcel thereof, and has good right and lawful authority to grant and convey the same in manner aforesaid; and that the said parties of the second part, their heirs and assigns, shall peaceably and quietly possess, hold, and enjoy the said property, and every part and parcel thereof, against all and every person or persons lawfully claiming or to claim the same or any part thereof.

And the said party of the first part does hereby covenant and agree to and with the said parties of the second part, their heirs, executors, administrators, and assigns, that the said party of the first part will, when requested, make, execute, and deliver all such further deeds, conveyances, instruments, and assurances, except covenants of title, as may be deemed necessary or proper for the purpose of more perfectly conveying and assuring all and singular the lands and other property aforesaid to the said parties of the second part, their heirs and assigns, forever.

In witness whereof the party of the first part has hereunto affixed his hand and seal the day and year first above written.

H. E. HOVEY. [SEAL.]

Witness—
THOMAS DARLING.
AUGUSTUS SCHONBORG.

64 STATE OF NEW YORK,
City and County of Albany, ss:

Thomas Darling, being duly sworn, deposes and says that he resides in the village of Flus'ing, in said State; that he is one of the subscribing witnesses to the execution of a deed bearing date the eight' day of January, 1859, made by Aaron E. Hovey to Eben. S. Stephenson and Theodore Olcott; that the foregoing is a true copy of the said deed in all its parts; that he was present and saw the said original deed executed and delivered by said Aaron E. Hovey; that he was well acquainted with the said Aaron E. Hovey, and knew him to be the grantor named and described in, and who executed the said original deed, and that on such execution of said deed by him, this deponent signed his name as a witness of the execution thereof.

THOMAS DARLING.

Sworn to & subscribed*scribed* this 20th February, 1868, before me.
R. W. PECKHAM,
Just. Sup. Court.

65 UNITED STATES OF AMERICA:

By Reuben E. Fenton, governor of the State of New York:

It is hereby certified that Rufus W. Peckham was, on the day of the date of the annexed certificate, subscribed by him, justice of the supreme court of the State of New York for the third judicial district, and by law duly authorized to grant the same; that the same is in due form; that the signature of said justice to said certificate is in his proper handwriting, and is genuine; and that full faith and credit may and ought to be given to his official acts, and that he is a judge of supreme jurisdiction within and for the said State of New York.

{ SEAL OF THE } In testimony whereof the great seal of the State
{ STATE OF N. Y. } is hereunto affixed. Witness my hand at the city of Albany, the twentieth day of February, in the year of our Lord one thousand eight hundred and sixty-eight.

(Signed) R. E. FENTON.

Passed the secretary's office the 20th day of February, 1868.

(Signed) D. WILLERS, JR.,
Dep. Sec'y of State.

66 *Quit-claim with covenant.*

This indenture, made the eighteenth day of December, in the year one thousand eight hundred and sixty-seven, between Eben. S. Stephenson, of the city of New York, of the first part, and Theodore Olcott, of the city of Albany, and State of New York, of the second part, witnesseth—

That the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, remised, released, and quit-claimed, and by these presents does grant, remise, release, and quit-claim, unto the said party of the second part, and to his heirs and assigns forever, all his right, title, and claim to, or interest in the several tracts, pieces, and parcels of land known as the High Shoals lands, situated in the counties of Gaston, Lincoln, and Cleveland, in the State of North Carolina, being the same lands which were conveyed or intended to be conveyed to Aaron E. Hovey by William P. Bynum and Thomas
67 Grier, executors of Andrew Hoyl, deceased, trustee of the High Shoals Manufacturing Company, a corporation created by the legislature of North Carolina, by deed bearing date the first day of January, one thousand eight hundred and fifty-nine, and by the said Aaron E. Hovey conveyed to the parties of the first and second parts, by deed bearing date the eighth day of January, one thousand eight hundred and fifty-nine, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances: To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

And the said Eben S. Stephenson, for himself, his heirs, executors, and administrators, does covenant, promise, and agree to and with the said party of the second part, his heirs and assigns, that
68 he has not made, done, commit'ed, executed, or suff*ord* any act or acts, thing or things whatsoever, whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are or at any time hereafter shall or may be impeached, charged, or encumbered in any manner or way whatsoever.

In witness*eth* whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

EBEN S. STEPHENSON. [SEAL.]

Sealed and delivered in the presence of—
ROBERT H. FERGUSON.
E. H. COREY.

[Fifty-cent rev. stamp.]

[Edwin F. Corey, notary public, and commissioner for Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Michigan, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, N. Carolina, South Carolina, Georgia, Ohio, Kentucky, Illinois, Indiana, Alabama, Louisiana, Mississippi, Texas, Arkansas, Florida, Iowa, Missouri, Tennessee, Wisconsin, California, and Territories. Office 63 Wall st., N. Y. City —North Carolina single.]

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

Be it remembered that, on this eighteenth day of December, in the year one thousand eight hundred and sixty-seven, before me, the undersigned, Edwin F. Corey, a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of North Carolina, to take the ac-
69 knowledgement of deeds, &c., to be used or recorded therein, personally appeared Eben S. Stephenson, who acknowledged the execution of the annexed instrument for the purpose therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

EDWIN F. COREY,
COMMISSIONER DEEDS
FOR NORTH CAROLINA.

EDWIN F. COREY,
Commissioner for the State of North Carolina, office, 63 Wall st., New York.

STATE OF NORTH CAROLINA, *Gaston County:*

This deed and certificate was duly recorded in the register's office for said county, in book No. 3, page 740, Jan. 23rd, 1869.

C. C. WITHERS,
Reg. of Deeds.

In the probate court, 12th April, 1869.

STATE OF NORTH CAROLINA, *Lincoln County:*

Upon the exhibits made before me, the within deed is adjudged properly proved. Let the same, with this certificate, be registered.

S. P. SHERRILL,
Probate Judge.

STATE OF NORTH CAROLINA, *Lincoln County:*

This deed and certificates were duly recorded in the register's
70 office for Lincoln County, in book 45, pages 422 & 423, on 12th April, 1869.

THOMAS W. ROBINSON, *Register.*
By JOHN D. SHAW, *Deputy.*

NORTH CAROLINA, *Lincoln County:*

I, William J. Hoke, clerk and master in equity for Lincoln County, do certify that there is no record on my docket, Bynum and Grier against Hovey for foreclosure of mortgage, nor any proceedings in any such case.

Given under my hand and seal of office at Lincoln, July 4th, 1868.
[L. S.]

W'M J. HOKE,
C. & M. E.

CLERK AND MASTER'S OFFICE,
January 31st, 1868.

I, John B. White, clerk and master of the court of equity for Gaston County, do hereby certify that there is no bill or decree on file in this office for the foreclosure of a mortgage made by Aaron E. Hovey to Bynum and Grier, on the 1st day of January, 1859.

JOHN B. WHITE,
C. & M. E.

Know all men by these presents that I, Aaron E. Hovey, hereby deliver and surrender the possession of the entire property and estate known as the "High Shoals," comprising about 14,000 acres of land, together with all the houses, out-houses, mills, machinery, and
71 all other appurtenances thereunto belonging, or in anywise appertaining, to William P. Bynum and Thomas Grier, agents and trustees of the old "High Shoals" Company, and for their use, according to the purchase made by them on the 28th April, 1860, and hereby acknowledge myself to hold said lands and premises under them, and for their use and benefit, subject to removal at the will and discretion of the said trustees.

A. E. HOVEY. [SEAL.]

May 24th, 1860.
Witness: W'M SLOAN.

72 And thereupon, at the request and by the direction of the said complainant, Theodore Olcott, by his solicitor aforesaid, writs of subpœna are issued in pursuance of the prayer of the said bill of complaint against the said defendants, returnable on the first Monday in June, 1868; which said writs of subpœna are in the following words and figures, to wit:

73 UNITED STATES OF AMERICA,
District of North Carolina, ss:

The United States of America to Charles Wilkes, Robert R. Bridgers, B. B. Barron, John L. Bridgers, in his own right, John L. Bridgers, executor of Powell, deceased; William P. Bynum and Thomas Grier, executors and trustees of Andrew Hoyle, deceased; William Sloan and Aaron E. Hovey.

We command you and every one of you, that you appear before our judges of our circuit court of the United States of America for the district of North Carolina, at the office of the clerk of the said court, in the city of Raleigh, in said district, on the first Monday in the month of June next, to answer the bill of complaint of Theodore Olcott, of New York, and Eben S. Stephenson, of Massachusetts, this day filed in the clerk's office of said court, in said city of Raleigh, then and there to receive and abide by such judgement and decree as shall then or thereafter be made, upon pain of judgement being pronounced against you by default.

To the marshal of the district of North Carolina to execute.

[SEAL.] Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Raleigh, in said
74 district, the last Monday in November, 1867, and in the 92nd year of the independence of the United States.

Issued the 22nd day of April, 1868.

N. J. RIDDICK, *Clerk.*

MEMORANDUM.—The within-named defendants are notified that, unless they enter their appearance in the clerk's office of said circuit court, at Raleigh aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

N. J. RIDDICK, *Clerk.*

And on the return day of said writs, to wit, on the first Monday in June, 1868, the same being a rule-day, at the clerk's office of this court, the marshal makes return that he has executed the said writs by delivering a true copy thereof to all the parties defendant aforesaid, except A. E. Hovey; and as to him the said writ of subpœna is returned, service acknowledged by said Aaron E. Hovey.

And at the next succeeding rule-day, to wit, on the first Mon-
75 day in July, 1868, the said Aaron E. Hovey having failed to appear and answer said bill, it is ordered that the said bill of complaint be taken pro confesso, and sit down for hearing ex parte as to him.

And, on the same day, the answers to the said bill of complaint by Charles Wilkes, R. R. Bridgers, J. L. Bridgers, B. B. Barron, W. P. Bynum, Thomas Grier, and William Sloan, are severally filed; which said several answers and amended answers are as follows, to wit:

76 In the circuit court of the United States for the district of North Carolina.

The answer of Charles Wilkes, a defendant, to the bill of complaint of Theodore Alcott and Eben S. Stephenson, plaintiffs.

This defendant, reserving to himself all rights of exception to the said bill, for answer thereto sayeth: It is true, as charged in said bill, that in the month of December, 1865, he made an executory contract in writing with R. R. Bridgers, acting in his own behalf, and in behalf of John L. Bridgers, B. B. Barron, and Powell, for the purchase of the property described in plaintiffs' bill, upon the terms as therein set forth; that in the month of January, 1866, he made a payment of ten
77 thousand dollars in pursuance of his contract of purchase, and took possession of the property; that he found the improvements upon the property greatly out of repair—the furnaces, found'ries, and forges were worn out, and the water-wheels, buildings, and races in a ruinous condition; that, in order to improve the property, and make it available for the manufacture of iron, nails, &c., suc'essfully, it become necessary to incur at once a large expenditure of money; that the improvements thus made by respondent upon the property, in repairing and enlarging the same, introducing new machinery and improvements in the mode of transporting the ores and manufactured material, caused him to incur an expenditure of thirty-five thousand dollars. Then, when this defendant made the payment aforesaid upon the property, it was agreed between him and his bargainors, that the payment of the residue of the purchase-money should not be called for for some time; that, in pursuance of this understanding, further payment was not demanded until early in the year 1867; that prior to that time, and at the time of the demand, defendant called upon his bargainors for an abstract of their title; that they failed to comply with his request, referring him to

William P. Bynum, one of the defendants, from whom they pur-
78 chased, for the desired abstract of title; that he called upon said Bynum, in pursuance of the reference of his bargainors, who also failed to furnish the desired abstract; that as the sum of money which defendant had agreed to pay for said property was large, he was unwilling to make any further payment until he was satisfied that his bargainors were able to fulfil the executory contract upon their part; that he caused their title to the property to be investigated, when the facts in regard to it were found to be as set forth in plaintiffs' bill, with the exception of the facts that the cestui que trusts of the defendant Hovey were unknown; that the facts in regard to the title were submitted by this defendant to counsel learned in the law, by whom he was advised that the title of his bargainors was defective, for the reason that they only had a contract, which was executory in its character, upon the defendants Bynum and Grier, as executors of Andrew Hoyle, for title, upon which contract a large portion of the purchase-money, amounting to upwards of thirty thousand dollars in gold, was due thereon and unpaid; and for the additional reason that the pretended sale of said property by said Bynum and Grier, under
79 the Hovey mortgage in 1860, did not divest said Hovey of his rights in said property, or that of his cestui que trusts; and for the further additional reason that the deed of conveyance from the "High Shoals Manufacturing Company," the corporation which originally owned said property, was defective to convey the estate it purported to convey to Philip W. Groot, because it was signed by said Hoyle, under his individual seal, when it should have been sealed with the common seal of the corporation, and signed by the president and two other members of the corporation. Defendant was further advised that it was impracticable for said corporation to affirm the defective deed of conveyance of Andrew Hoyle to his alianee, because, between that time and the date of the contract of purchase made by defendant for the property, the corporators had lost the benefit of their charter by the non-uses of their corporate privileges and powers for two years and more, as charged in plaintiffs' bill. Acting upon the counsel of his legal adviser, defendant refused to make any further payment upon his contract of purchase, whereupon suits were brought against him, by his bargainors, at law, for the recovery of the residue of the purchase-money, amounting in principal money to one hundred and forty thousand dollars, with interest thereon. He was advised
80 that he could set up no defence at law to a recovery. A recovery at law was accordingly effected, whereupon he filed his bill in equity against his bargainors, in one of the State courts, for an injunction against them in the collection of the money under executions at law, and for general relief against said executory contract, upon the ground of the defective character of the title of his bargainors, as set forth in plaintiffs' bill, in conjunction with the further defects as herein set forth; that he obtained a fiat of injunction upon his bill, which is operative and in force against his bargainors, and which suit is now pending in the court of equity for the county of Mecklenburg, in the State of North Carolina.

Further answering, defendant saith: It is true the executory contract made between him and his bargainors in regard to said property was entered into in Washington City, D. C., with R. R. Bridgers, as the active agent of the bargainors, in which city defendant resided at the time. That it was made in the month of December, 1865. It is true at that time he had a general idea of the mineral and manufacturing

resources of said property; but had no particular knowledge of the title thereof. That he was informed by said Bridgers at that time, that the title to the property was indisputable, and that he and his
81 associates could make to him a perfect title in fee simple thereto. That upon the faith of this assurance, and a stipulation to that effect on the part of said Bridgers in the executory contract of purchase, it was signed by said Bridgers and defendant; that he had no knowledge at the time this contract of purchase was made, of the plaintiffs or of their claim to the property, but he supposed and believed at that time that the title of his vendors thereto was indisputable in every respect. Defendant, further answering, saith, that his refusal to make further payments upon his contract of purchase had its origin in good faith, for the reasons herein set forth, as to the defective character of the title of his vendors.

Having answered, defendant prays to be hence dismissed with his costs, &c.

OSBORNE AND WILSON,
Sols.

Charles Wilkes maketh oath that the facts set forth in the foregoing answer to the bill of complaint of Theodore Olcott and Eben S. Stephenson, as of his own knowledge are true, and those as of his information he believes to be true.

CHARLES WILKES.

Sworn to before me, this the 2nd day of July, A. D. 1868.
F. W. AHRENS,
U. S. Commissioner for N. C.

82 *Answer of R. R. Bridgers and John L. Bridgers.*

In the circuit court of the United States for the District of North Carolina.

The joint and several answer of Robert R. Bridgers and John L. Bridgers to the bill of complaint filed in this honorable court by Theodore Olcott, of the city of Albany, in the State of New York, and Eben S. Stephenson, a citizen of the State of Massachusetts, against these defendants and others.

These defendants, saving and reserving, &c., for answer to said bill or so much thereof, &c., answering, say that true it is, that they, with the defendant, Bolen B. Barron, about the month of March, 1862, contracted (the said John L. Bridgers representing as executor, under power, the late Joseph J. W. Powell) with the defendants W. P. Bynum and Thomas Grier, to purchase the real estate known as the "High
83 Shoal" property described particularly in the bill, with certain fixtures, machinery, &c., thereto attached, upon the terms as set forth in the answer to the plaintiffs' bill by their co-defendants, W. P. Bynum and Thomas Grier; true also it is, that the said real estate was once the property of the "High Shoals Manufacturing Company," a corporation chartered by the State of North Carolina, and that the same was, by direction of the said company, attempted to be conveyed by deed bearing date the 24th day of February, A. D. 1854, executed by Andrew Hoyle, who was then the president of the said company, to one Philip W. Groot, of the State of New York, a correct copy whereof these defendants believe is exhibited by the plaintiff; true

also it is that, on the said 24th day of February, A. D. 1854, the said Philip W. Groot reconveyed the said premises to the said Andrew Hoyle, in trust, to secure the sum of fifty thousand dollars for the purposes stated by the complainants in their said bill; true also it is that the said Andrew Hoyle, having departed this life in the latter part of 1856, left a last will and testament in writing, which was only proved and allowed in the county of Gaston, the same being his domicil—
84 in and by which said will, the co-defendants, W. P. Bynum and Thomas Grier, were appointed executors, and that they assumed the office, and about 28th of December, 1858, sold the said "High Shoals property" for the balance yet remaining due from the said Philip W. Groot, the same being about thousand dollars, the sale having been made under the powers conferred upon them by the will of their testator, and the deed of mortgage aforesaid. These defendants have understood, and believe, that one Aaron E. Hovey, who is a co-defendant, purchased the said property at sale, (and not the plaintiffs,) and from their information they believe that the terms of sale are correctly set forth by their co-defendant Bynum. These defendants are informed, and believe it to be true, that their co-defendants, Bynum and Grier, conveyed the said property to the said Hovey, and took security for the payment, for such sum as was not paid in cash, in the manner stated by the plaintiffs. They are also informed, and believe the information to be true, that the said Hovey, having failed to pay the price of the promises as he had stipulated to do, the same were sold,
85 pursuant to the terms of the mortgage, and purchased by the said "High Shoals Manufacturing Company," through their co defendant, William Sloan, who acted as the agent of the company, and bought for it, in order to prevent a sacrifice.

These defendants never had any knowledge of the High Shoals property till about March of the year 1862; when, as in the progress of the late civil war, there slave property became endangered by its proximity to the seaboard, they sought to transfer it to a place where it might be both secure and profitable, and in their researches for such a place they were directed to this property.

Being informed that it was for sale, they inspected it, and enquired of its title of several members of the bar resident in its vicinity, who, it was reported to these defendants, theretofore had had occasion to professionally investigate it. They were assured by these gentleman, among whom were William Lander and B. S. Gaither, esquires, that the title was unquestionably good, except as to a few acres, not exceeding five acres, called the "Ormand Ore Bank," which is expressly excepted in the contract with Wilkes. The same assurance was given to them by their co-defendant, W. P. Bynum, who, was not only regarded as a lawyer of excellent standing, but was then, as these defendants
86 were then informed and now know, the agent of the company, with full power to manage all matters concerning the sales and transfers of said property. These defendants had no information or cause to suspect that they could not get a good title from the "High Shoals Company," and they fully believed that they could do so, and therefore made the contract hereinbefore referred to, with its agent. This contract was reduced to writing, and duly executed by the parties and, although in duplicates, neither of the papers can be produced; one of them was retained by their co-defendant, Bynum, and the other was retained by the defendant, R. R. Bridgers. In the confusion and loss of valuables occasioned by the march of the Federal Army through Western North Carolina, about the conclusion of the war, both papers,

resources of said property; but had no particular knowledge of the title thereof. That he was informed by said Bridgers at that time, that the title to the property was indisputable, and that he and his
81 associates could make to him a perfect title in fee simple thereto. That upon the faith of this assurance, and a stipulation to that effect on the part of said Bridgers in the executory contract of purchase, it was signed by said Bridgers and defendant; that he had no knowledge at the time this contract of purchase was made, of the plaintiffs or of their claim to the property, but he supposed and believed at that time that the title of his vendors thereto was indisputable in every respect. Defendant, further answering, saith, that his refusal to make further payments upon his contract of purchase had its origin in good faith, for the reasons herein set forth, as to the defective character of the title of his vendors.

Having answered, defendant prays to be hence dismissed with his costs, &c.

OSBORNE AND WILSON,
Sols.

Charles Wilkes maketh oath that the facts set forth in the foregoing answer to the bill of complaint of Theodore Olcott and Eben S. Stephenson, as of his own knowledge are true, and those as of his information he believes to be true.

CHARLES WILKES.

Sworn to before me, this the 2nd day of July, A. D. 1868.
F. W. AHRENS,
U. S. Commissioner for N. C.

82 *Answer of R. R. Bridgers and John L. Bridgers.*

In the circuit court of the United States for the District of North Carolina.

The joint and several answer of Robert R. Bridgers and John L. Bridgers to the bill of complaint filed in this honorable court by Theodore Olcott, of the city of Albany, in the State of New York, and Eben S. Stephenson, a citizen of the State of Massachusetts, against these defendants and others.

These defendants, saving and reserving, &c., for answer to said bill or so much thereof, &c., answering, say that true it is, that they, with the defendant, Bolen B. Barron, about the month of March, 1862, contracted (the said John L. Bridgers representing as executor, under power, the late Joseph J. W. Powell) with the defendants W. P. Bynum and Thomas Grier, to purchase the real estate known as the "High
83 Shoal" property described particularly in the bill, with certain fixtures, machinery, &c., thereto attached, upon the terms as set forth in the answer to the plaintiffs' bill by their co-defendants, W. P. Bynum and Thomas Grier; true also it is, that the said real estate was once the property of the "High Shoals Manufacturing Company," a corporation chartered by the State of North Carolina, and that the same was, by direction of the said company, attempted to be conveyed by deed bearing date the 24th day of February, A. D. 1854, executed by Andrew Hoyle, who was then the president of the said company, to one Philip W. Groot, of the State of New York, a correct copy whereof these defendants believe is exhibited by the plaintiff; true

also it is that, on the said 24th day of February, A. D. 1854, the said Philip W. Groot reconveyed the said premises to the said Andrew Hoyle, in trust, to secure the sum of fifty thousand dollars for the purposes stated by the complainants in their said bill; true also it is that the said Andrew Hoyle, having departed this life in the latter part of 1856, left a last will and testament in writing, which was only proved and allowed in the county of Gaston, the same being his domicil—
84 in and by which said will, the co-defendants, W. P. Bynum and Thomas Grier, were appointed executors, and that they assumed the office, and about 28th of December, 1858, sold the said "High Shoals property" for the balance yet remaining due from the said Philip W. Groot, the same being about thousand dollars, the sale having been made under the powers conferred upon them by the will of their testator, and the deed of mortgage aforesaid. These defendants have understood, and believe, that one Aaron E. Hovey, who is a co-defendant, purchased the said property at sale, (and not the plaintiffs,) and from their information they believe that the terms of sale are correctly set forth by their co-defendant Bynum. These defendants are informed, and believe it to be true, that their co-defendants, Bynum and Grier, conveyed the said property to the said Hovey, and took security for the payment, for such sum as was not paid in cash, in the manner stated by the plaintiffs. They are also informed, and believe the information to be true, that the said Hovey, having failed to pay the price of the promises as he had stipulated to do, the same were sold,
85 pursuant to the terms of the mortgage, and purchased by the said "High Shoals Manufacturing Company," through their co defendant, William Sloan, who acted as the agent of the company, and bought for it, in order to prevent a sacrifice.

These defendants never had any knowledge of the High Shoals property till about March of the year 1862; when, as in the progress of the late civil war, there slave property became endangered by its proximity to the seaboard, they sought to transfer it to a place where it might be both secure and profitable, and in their researches for such a place they were directed to this property.

Being informed that it was for sale, they inspected it, and enquired of its title of several members of the bar resident in its vicinity, who, it was reported to these defendants, theretofore had had occasion to professionally investigate it. They were assured by these gentleman, among whom were William Lander and B. S. Gaither, esquires, that the title was unquestionably good, except as to a few acres, not exceeding five acres, called the "Ormand Ore Bank," which is expressly excepted in the contract with Wilkes. The same assurance was given to them by their co-defendant, W. P. Bynum, who, was not only regarded as a lawyer of excellent standing, but was then, as these defendants
86 were then informed and now know, the agent of the company, with full power to manage all matters concerning the sales and transfers of said property. These defendants had no information or cause to suspect that they could not get a good title from the "High Shoals Company," and they fully believed that they could do so, and therefore made the contract hereinbefore referred to, with its agent. This contract was reduced to writing, and duly executed by the parties and, although in duplicates, neither of the papers can be produced; one of them was retained by their co-defendant, Bynum, and the other was retained by the defendant, R. R. Bridgers. In the confusion and loss of valuables occasioned by the march of the Federal Army through Western North Carolina, about the conclusion of the war, both papers,

as these defendants are informed and believed, were lost, and there is no exact copy extant; but the terms are well understood by the parties and the co-defendant, Wilkes, and are truly set forth by their co-defendand Bynum.

Further answering, these defendants say that they are ignorant of all the other matters charged by the plaintiffs in their bill. They know nothing of the matters set forth, wherein and whereby it is alleged that the plaintiffs had or have any interest or right in or to the prem-
87 ises; and they have no reason to believe, nor do they believe, that the plaintiffs ever had or have now any right or interest in the premises. They are personally ignorant of every matter charged in the plaintiffs' bill which is alleged to have occurred prior to their occupation of the premises under their contract of purchase; and they have no information which creates in them a belief of the facts charged in the bill of complaint other than such as are stated in the answer of their co-defendant, W. P. Bynum, and such as are established by deeds duly proved and registered and exhibited. These defendants had no notice of any kind that the plaintiffs had any equitable title whatever to the premises. Indeed, they did not know of the existence of such persons, and never did till they learnt it by reading their bill of complaint.

These defendants were greatly surprised at the filing of the bill. They had been in the quiet enjoyment of the premises from the time of their purchase until the contract of sale to the defendant Wilkes, and had heard of no controversy about the title; they had made on them exclusive improvements of large value, and erected many forges and furnaces when they contracted to sell; and they are satisfied that their outlay considerably exceeded their income of profits.
88 When they were approached by the defendant Wilkes, proposing to purchase from them, the proposition was made to the defendant, R. R. Bridgers, who, answering for himself, says that said Wilkes declared in substance that he was well acquainted with the property, and had been so for years, and with the title also, and indeed better than this defendant was, and declined to pay any attention to this defendant's advice about consulting persons as to the title, and without questioning at all the validity of the title, he made with these defendants the contract of purchase mentioned by the plaintiffs. And these defendants, jointly answering, say that Wilkes never suggested any difficulty about the title until after he was sued by these defendants in the county court of Mecklenburg County, for about $130,000 principal, and interest thereon, of parcel of the price of the premises, which suit was brought to July term, 1867.

Some time in August, after the said suit was brought, John Wilkes, son of the said Charles Wilkes, remarked to the defendant, John L. Bridgers whilst he was in Tarborough, that he had been informed there was a technical difficulty in getting the legal title, because it had not been property transferred by the company and those who pur-
89 chased under its trustees; at the same time saying that he supposed that there could be no serious practical difficulty in perfecting the title. At the time of this conversation, the said John Wilkes desired, on behalf of his father and self, futher indulgence of the debt; which not being granted, they soon afterwards brought their bill in equity to enjoin these defendants from proceeding to judgement and execution and collecting the money then due on the contract. This injunction was dissolved by order of the supreme court of the State, held in January, 1868, and these defendants were allowed to proceed to judgement

against the said Charles and John Wilkes, which they obtained at April term, 1868, in Mecklenburg County court, but have been unable to get satisfaction thereof, because, as is alleged, the said defendants, though claiming and owning a large real estate situate in the city of Washington and elsewhere, are possessed only of a very small visible estate subject to execution, or other estate liable to be subjected to sale by application to a court of equity.

Further answering, these defendants say that, in and by virtue of the decision of the supreme court in the case aforesaid, the said Charles
90 Wilkes was compelled to submit to a verdict and judgement in the suit brought against him as aforesaid, before he could obtain an injunction against its collection; and by the course of the court he was obliged, upon obtaining such injunction, to give bond with good security in an amount sufficiently large to satisfy said judgement and the costs thereof. This decision of the supreme court was made at January term, 1868, and the said Charles Wilkes declined to enjoin the issuing of an execution on said judgement.

Further answering, these *these* defendants say they are informed, and believe the information to be true, that, after this, the said Charles Wilkes sought after means to thwart the defendants in their purpose to enforce his compliance with his contract aforesaid with them, and has resorted to this bill as a contrivance fraudulently devised to screen him from honestly fulfilling his contract, and has procured the bought instrumentality of the plaintiffs to set up pretendingly for themselves, but, in fact, for himself, a pretended title to the premises, in order to supersede that of these defendants and the "High Shoals Manufacturing Company," and by these means to procure, by fraud and covin, his exemption from abiding and fulfilling his contract with these defendants.

91 And these defendants, from the information which they have of such being the purpose of the plaintiffs' bill, do not doubt that this bill is truly and substantially a bill of the said Charles Wilkes, filed with the purpose of enabling him, under false pretences, to evade his contract with these defendants. These defendants believe, and so charge, that this suit is gotten up by the said Charles Wilkes for his own benefit, and that he has, through fraud and cunning, stirred up this litigation to defeat and defraud these defendants.

These defendants insist that said complainants have not, by their said bill, made such a call as entitles them, in a court of equity, to any discovery from these defendants, or to any relief against them as to the matters contained in said bill or any of them, and that any discovery which has been made by these defendants, touching the matters complained of in said bill or any of them, cannot be of any avail to said complainants for any of the purposes for which a discovery is sought by said bill against these defendants, nor entitle the complainants to any relief in this court touching any of the matters therein complained of, and these defendants pray that they may have the same advantage of that objection as if it had been taken by way of demand or plea.

92 And the defendant, John L. Bridgers, further says and suggest' that he was adjudicated a bankrupt on or about the 22nd of May last, and claims the benefit thereof.

These defendants having answered all the matters of fact alleged and charged against them, pray hence to be dismissed with their costs, &c.

John L. Bridgers and Robert R. Bridgers make oath that the facts

set forth in the foregoing answer of their own knowledge are true, and that those otherwise stated they believe to be true.

JOHN L. BRIDGERS.
ROBERT R. BRIDGERS.

Subscribed and sworn to before me.

G. W. BROOKS,
U. S. Dist. Judge.

93 *Answer of B. B. Barron.*

In the circuit court of the United States for the district of North Carolina. June term, A. D. 1868.

The separate answer of B. B. Barron to the bill of complaint of Theodore Olcott and Eben S. Stephenson, filed against him and R. R. Bridgers, J. L. Bridgers, W. P. Bynum, Thomas P. Grier, William Sloan, A. E. Hovey, and Charles Wilkes.

This defendant, for answer to said bill or so much thereof, &c., saving and reserving, &c., answering, says that, to the best of his knowledge, in the spring of 1862, the defendants, R. R. & J. L. Bridgers, associated this defendant with them in the purchase of the High Shoals property; that he joined the enterprise, placing his reliance upon it as a judicious investment in the judgment and discretion of the Messrs. Bridgers; that he was an inactive partner in the transaction, and has no knowledge of the various matters touching the title to
94 said property mentioned in plaintiffs' bill, otherwise than as information; that he has no knowledge whatever of the alleged deed from Hovey to plaintiffs of the 8th of January, 1859, nor did he ever know or hear of any circumstance calculated to put him upon inquiry touching the same; and this defendant does not believe that such an instrument was ever written, or, if written, was ever delivered or otherwise intended to operate as a bona fide conveyance.

This defendant, further answering, says that he claims to have been a bona fide purchaser for a valuable consideration, and without notice of any (if any) hidden or other equities of the plaintiffs having, in conjunction with his other partners, agreed to give the sum of $65,000 for said property.

Further answering, he says that there is a balance due by him and the other partners of $35,000, with interest therein, since April, 1864, subject to such credit as the ownership of $7,000 worth of stock in High Shoals Manufacturing Company may create; the said partnership ow'ing that amount of stock.

Further answering, this defendant says that there is a balance due from defendant Wilkes, as the balance due from him on his said contract of purchase, of $140,000, with interest thereon, from the 15th of January, 1866. As to the profits derived from the said prop-
95 erty, by this defendant and his partners, further answering, this defendant says that, without being able to state the exact amounts of expenditures and receipts thereon while in their possession, he confidently avers that the expenditures thereon exceeded the earnings and profits, rents, and issues thereof by a considerable balance for the whole time he and his said partners occupied the same.

This defendant, further answering, respectfully suggests to the court

here, that, upon his petition, filed for that purpose, he was, on the 28th day of May, 1868, legally adjudged a bankrupt.

And this defendant, having fully answered, prays to be hence dismissed, &c.

MOORE, BOYDEN & BAILEY,
Sol. for Defendant Barron.

In the circuit court of the United States for the district of North Carolina.

On this the 8th day of June, A. D. 1868, personally appeared before me, N. J. Riddick, clerk of the circuit court of the United States for the North Carolina district, B. B. Barron, and, after being duly sworn, says that the matters set forth in the foregoing answer as of his own knowledge are true, and the others he believes to be true.

B. B. BARRON.

Sworn and subscribed before me this 8th of June, A. D. 1868.
N. J. RIDDICK, *Clerk.*

96 *Answer of W. P. Bynum.*

In the circuit court of the United States for the district of North Carolina.

The separate answer of W'm P. Bynum, to the bill of complaint filed in this honorable court by Theodore Olcott, of the State of New York, and Eben S. Stephenson, of the State of Massachusetts, against this defendant, Thomas Grier, and others.

This defendant, saving and reserving, &c., for answer to said bill, &c., answering, saith: True it is that the "High Shoals Manufacturing Company," a corporation created by the State of North Carolina, owned a large real estate in the counties of Lincoln, Gaston, and Cleveland, in said State, and chiefly valuable for the mills, furnaces, forges, and other machinery erected thereon, and for the water-power, iron-ores,
97 gold, and other minerals it contained, and the timber growing thereon; true also it is, that in February, 1854, Andrew Hoyle, the president of said corporation, by the order and direction of the same, sold or attempted to sell the said property known as the "High Shoals," to one Philip W. Groot, of the State of New York; the reasons of said sale and the terms thereof were, as follows: Many of the stockholders of said corporation had died, and the stock fallen into the hands of their legal representatives, and infants, and become so subdivided, that the operations of the company could not be successfully managed; the company had, therefore, become embarrassed, and resolved to sell.

The purchaser, Philip W. Groot, bought on the 24th February, 1854, paid down in cash $25,000, and executed to Andrew Hoyle, the president of the company, his penal bond in the sum of $100,000, which was to be void on condition that he paid $25,000 on the 1st March, 1855, with interest from 1st March, 1854, and the further sum of $25,000 on the 1st September, 1855, with interest as aforesaid, the whole amount of the purchase-money being $75,000, and to secure the balance of said purchase-money, at the times stipulated in said penal bond, the said Groot, on the said 24th February, 1854, after receiving a conveyance in fee, of said High Shoals property, executed a trust deed in the

98 nature of a mortgage, of the said property, to the said Andrew Hoyle, his heirs and assigns. Correct copies of both said deeds are set forth in the plaintiffs' bill, and are referred as a part of this answer.

The purchaser, P. W. Groot, immediately entered into the full possession and enjoyment of the property conveyed to him, and on the 8th April, 1854, by deed, bargained and sold the said property, subject to the mortgage, to one Samuel Beardsly and Greene C. Bronson, of the State of New York, in trust for the "High Shoals Mining and Manufacturing Company," purporting to be a corporation created under the laws of New York. The consideration of said deed of conveyance, as expressed therein, was the sum of seven hundred and fifty thousand dollars, cash received. A copy of said deed, marked (A,) accompanies this answer, and prayed to be taken as a part thereof.

Further answering, the defendant says, that this new company or corporation, so purchasing, immediately entered into possession of all the High Shoal property, and operated the same, on a large scale, in the manufacture of iron and iron fabricks, in operating for gold, from the said 8th day of April, 1854, until the 28th April, 1860, during the whole of which time, the operations and affairs of said "High Shoals Mining and Manufacturing Company" were conducted and managed in this
99 State by the plaintiffs, the co-defendant A. E. Hovey, and one Thomas Darling, all of whom, except the plaintiff E. S. Stephenson, resided upon the premises.

Further answering, defendant says: True it is, that Andrew Hoyle died in 1856, and that this defendant and Thomas Grier were left by him the executors of his will and were duly qualified as such at the February sessions, 1857, of the county court of Gaston, the county of the testator's domicil.

Further answering, this defendant says, that he and his co-executor, Thomas Grier, who is one of the defendants, divided the labors and duties of the administration between themselves; and in the division, the sole management of this High Shoal debt and mortgage was assigned to this defendant, and his co-executor has had no connection therewith except in matters of form.

Further answering, this defendant says, that his testator, being the owner of a large amount of stock in the "High Shoals Manufacturing Company," by his will directs all of his property, after payment of certain specific legacies, to be reduced to cash, and divided among his children and grand-children, many of whom were infants, femes covert, and orphans, dependant upon this bounty of the testator.

It therefore became the duty of this defendant to perform the
100 trusts of the will with all convenient dispatch, all of which was well known to and pressed upon the plaintiff, Olcott, Darling, and Hovey, as urgent reasons why the debt should be paid or the mortgage foreclosed by sale.

The said "High Shoals Mining and Manufacturing Company" still failing to pay the debt due on said penal bond, or any part thereof, except two years' interest, which had been paid in the lifetime of Andrew Hoyle, and the said debt having having been due for upwards of three years, while the said New York company remained in the possession of said mortgage property, making large profits therefrom; and the value of the property rapidly diminishing from the use and distruction of timber and ores used in the manufacture of iron, as well as the decay of mills, machinery, and buildings, and the wear and tear of thirteen slaves, (all men,) which were mechanics, and sold and mortgaged as a part of said

property; and becoming satisfied that P. W. Groot and those claiming under him were unable or unwilling to pay, and that the only resource for the debt was the property mortgaged; this defendant, pursuant to the provisions of said mortgage and will of A. Hoyle, duly advertised the property for sale on 28th December, 1858.

A meeting of the stockholders of the High Shoals Manufacturing Company was duly called and held at the same time and place,
101 when and where it was unanimously agreed by the stockholders, the plaintiff E. S. Stephenson, being one of said stockholders and then present, agreeing thereto, that they would, by an agent, to present said property from going at a sacrifice and to save their said debt, run the property up to $58,000, the estimated amount of their claim.

Pending said sale, a proposition was made by one of the plaintiffs, (the said A. E. Hovey being present and assenting thereto.) and finally acceeded to by the High Shoals Manufacturing Company, that the thirteen slaves, being a part of the mortgaged property, should be put up and sold, and the proceeds entered as a credit upon the P. W. Groot bond, and then that the debt should be further reduced by cash payment, to $40,000, principal money, and a new bond given to defendants, Bynum and Grier, for this sum, a new deed executed, and a new mortgage made, to secure said sum of $40,000.

The slaves were accordingly then publicly sold, the plaintiffs, co-defendant A. E. Hovey, and the stockholders, putting in bids therefor. They sold for $9,160, and the High Shoals real estate was then put up and bid off, by Aaron E. Hovey, at what sum is not remembered by this defendant.

This defendant, his co-defendant Aaron E. Hovey, and the plaintiffs, by agreement, met together in Charlotte, N. C., on the 1st day of
102 January, 1859, to consummate the arrangement, when and where this defendant endorsed upon the Groot bond a credit of $9,160, proceeds of sale of the slaves, and the further sum of $7,858 33, the computed balance due on said bond, over the $40,000, to which latter sum the Groot debt was to be reduced. The said sum of $7,858 33 was paid by a reduction of $916 and $785, being dividend due plaintiff Stephenson on sale of negroes and the cash payment, as one of the stockholders of the High Shoals Manufacturing Company, the cash actually paid being $6,157, which was paid by the co-defendant, A. E. Hovey; the plaintiff Olcott paying nothing.

The following is a correct copy of the receipt given by E. S. Stephenson of his dividend of the cash payment made by A. E. Hovey, the original of which will be produced when required, viz:

"January 1st, 1859, rec'd of W. P. Bynum, executor of A. Hoyle, $785 83, in full of my dividend of $7,853 33, the amount of money paid by A. E. Hovey on the purchase of the High Shoals land the 28th Dec'r, 1858.

"(Signed) E. S. STEPHENSON."

The co-defendant, A. E. Hovey, then executed to this defendant and Thomas Grier, his co-executor, a penal bond in the sum of $80,000, on condition to be void on the payment of $40,000 in three equal pay-
103 ments, respectively on the 1st January, 1860, the 1st July, 1860, and the 1st January, 1861, with interest. This defendant then executed and delivered to A. E. Hovey a deed in fee for the High Shoals property, and took from him a mortgage on the same; copies of which two deeds, believed to be correct, are set forth by the plaintiffs and here

referred to. The penal bond of P. W. Groot for said debt was then cancelled and delivered to the said A. E. Hovey.

Answering further, this defendant says and charges that, as a part of the transaction, and in order to indemnify and save harmless the "High Shoals Manufacturing Company" from a certain law-suit then pending in Catawba County, in the name of the trustee, Andrew Hoyle, for the benefit of the High Shoals Mining and Manufacturing Company, and from certain complications of the property aforesaid, made by P. W. Groot, the said A. E. Hovey, on the 3rd January, 1859, executed and delivered to defendants Bynum and Grier a second mortgage on the same property, a copy of which is set forth by the plaintiffs and here referred to as a part of this answer.

This defendant charges and avers that said second mortgage, or mortgage of the equity of redemption of the said A. E. Hovey, is still outstanding and subsisting, and the conditions thereof unperformed; that the law-suit named in the said mortgage as pending in Catawba
104 County is still pending in said court and undetermined; that the costs of said suit, already accrued, are between $500 and $1,000, as he is informed and believes, and for which the defendants, Bynum and Grier, as trustees of the High Shoals Manufacturing Company, or individually, are liable, but which the said second mortgage was intended to indemnify them against; that this defendant and his co-executor, have already paid a small part of said costs, and are legally liable for the payment of the other costs, and may be called on for the same at any moment; that the costs of the equity suit in Gaston County, named in the said mortgage, are not all paid as they are informed; and that there are other conditions named in said second mortgage which have not been performed by said Hovey, and which, for that reason, are additional causes of liability to these defendants.

Further answering, the plaintiffs charge in their said bill that this defendant, in executing the deed of 1st of January, 1859, to A. E. Hovey, knew that said Hovey was only the nominal purchaser, and that the plaintiffs were the real purchasers and only responsible parties; this defendant answers and says that he positively denies any and all such knowledge, belief, or even conjecture; he denies that he at that time or since, and before the filing of plaintiffs' bill, received any information of such alleged fact from the plaintiffs or any one else, or had any
105 reasonable cause to believe such to be the fact. This defendant had no personal knowledge of either of the plaintiffs or A. E. Hovey, but, from information then in his possession, he believed that the plaintiff, Stephenson, was in failing circumstances, and that Olcott and Hovey were insolvent, or nearly so; that they all were speculators, purchasing upon credit, with the expectation of selling at an advance before payment fell due, and not having the ability or intention to pay unless they did so sell. With this conviction the defendant took the individual bond of A. E. Hovey, and looked to the mortgage as the only security for the debt; and when the defendant executed and delivered to A. E. Hovey the deed of 1st January, 1859, he fully believed that he was the real purchaser, so far as he or either of the plaintiffs could be a real purchaser under the circumstances. This defendant avers that all three of the above-named parties were present and together throughout the transactions, from the 28th Dec'r to the 3rd January, and at no time was any intimation made to him that A. E. Hovey was to be regarded in any other light than what the several deeds and mortgages made him, and this defendant certainly looked to him alone as the party against whom he could enforce the collection of the debt, at law or in equity.

Further answering, this defendant positively denies all knowledge of the existence of the deed of the 8th January, 1859, purporting
106 to convey the High Shoals property from Hovey to the plaintiffs, and this defendant had no reason to believe or suspect the existence of such alleged deed until it was set forth in plaintiffs' bill of complaint, and this defendant is fully satisfied that no bona fide claim was ever set up by the plaintiffs under said instrument before the present time.

Further answering, this defendant says that, from investigations made by him since the filing of plaintiffs' bill, he has ascertained and so charges that, after P. W. Groot conveyed his interest in the High Shoals property to Beardsly and Bronson, in trust for the "High Shoals Mining and Manufacturing Company," to wit, from the 8th of April, 1854, all the operations at said High Shoals were conducted in the name of said company; contracts were made in writing, signed the "High Shoals Mining and Manufacturing Company," by "T. Olcott, agent," or "Thomas Darling, agent;" that, after the alleged deed from Hovey to Stephenson and Olcott, of 8th January, 1859, the operations and contracts, notes given, were conducted, made, and signed the "High Shoals Mining and Manufacturing Company," by T. Darling, agent; and that affairs were so managed and conducted up to the sale of April the 28th, 1860, made by the defendant, and even after the said 28th April, 1860, notes for large sums were given, in settling up the affairs of the company, under the same name and style. This defendant positively affirms that,
107 neither Olcott, Stephenson, or Hovey, by word or act, directly or indirectly informed him or gave him cause to believe or suspect that the plaintiffs had a deed from Hovey of the premises, nor was such knowledge conveyed to those of the neighborhood, who continually dealt with the said company.

Further answering, the defendant says that A. E. Hovey, both before and after the purchase of January 1st, 1859, resided upon the premises, and occupied the chief dwelling-house, and on the few occasions of business which called him there, seemed to be the proprietor, even when plaintiffs were present, though he does not pretend to know their private relations to each other, all of them being strangers to this defendant, and seen by him for brief periods and on matters of business.

Answering further, this defendant says that when the first payment, under the sale of Hovey, fell due on the 1st January, 1860, this defendant demanded payment, and failing therein, after several vain efforts and delays, and becoming satisfied that no payment would be made, this defendant advertised the property for sale, to take place at the High Shoals, on the 28th April, 1860; a meeting of the stockholders of the High Shoals Manufacturing Company was also called and held at the same time and place, in which meeting, nearly all the stock
108 being represented, it was agreed, in order to prevent the property from going at a sacrifice, that the company would run it up to the amount of their debt and costs of sale, which was about the sum of $45,000, and to that end the said company authorized and instructed Dr. William Sloan to bid said sum and no more, as the agent of said "High Shoals Manufacturing Company." The co-defendant, A. E. Hovey, who was the purchaser and mortgager, was there informed of this resolution of the company and of the agency of Dr. Sloan, and the amount he was to bid, and he expressly and fully assented thereto; at the same time and place, Thomas Darling, the managing agent upon

the premises, and claimed in plaintiffs' bill as their agent, was duly informed of this arrangement and fully assented thereto.

Defendant further states that the said High Shoals Manufacturing Company were at that time reluctant to bid for said property, and many of the stockholders, as also this defendant, both before and on that day, made many efforts to induce Hovey to pay for the same, or other parties to purchase, being anxious to get rid of the property, if they could do so, without pecuniary loss.

Further answering, this defendant says that ample and extensive notice of said sale was given, and every inducement given and exertion made by this defendant to procure biddings and a purchase by
109 third parties at said sale. The property was then duly exposed to public sale, in the presence of a respectable number of persons, some of whom were men of capital, and after some bidding was knocked down to William Sloan, the last and highest bidder, at the sum of $45,000, or thereabouts, the estimated debt and costs, as provided for in the mortgage. During the entire bidding, the said A. E. Hovey and Thomas Darling were personally present and fully assenting thereto, well knowing that Dr. Sloan bought the property as the agent, not of this defendant, but of the High Shoals Manufacturing Company, and well knowing that said agent had instructions to bid no more than said debt, and only to prevent the sacrifice of the property.

Further answering, this defendant says that, believing that the purchase so made by Dr. Sloan as agent of the "High Shoals Manufacturing Company," and for their use and benefit, vested in the said company the equitable and beneficial title to the said property, and that no controversy could or would arise touching the title of said company, he delayed the execution of a formal deed to the said Dr. Sloan to the said property, in conformity to his said purchase; but that he and his co-executor now have, viz, on the 12th day of June, 1868, made,
110 executed, and delivered to Dr. William Sloan a *a* deed for said property, pursuant to his purchase made on the 28th April, 1860, to hold in trust and for the use and benefit of said "High Shoals Manufacturing Company," and subject to their control and direction.

A copy of said deed is filed with this answer, and prayed to be made a part of this answer, marked (B 2.)

Further answering, this defendant says and affirms that said sale was made in perfect good faith, and in obedience to a plain and peremptory duty which had devolved upon him; with no purpose or wish, as complainants charge, to reinvest himself and co-executor with the title of the said property, but from a conviction, derived from the express 'knowledgements of both Hovey and Darling, that payment could not and would not be made, as stipulated in the mortgage and penal bond of A. E. Hovey.

Further answering, this defendant says that, upon said purchase of Dr. Sloan, as the agent of the company, the said A. E. Hovey and Thomas Darling, then and there well knowing that said purchase was made for the use and benefit of the "High Shoals Manufacturing Company," expressly assented to, and acquiesced in the same, and the validity of their title thereby acquired, and then and there, in consideration of said purchase and the extinction of the debt due from A.
111 E. Hovey for said *prop*property, surrendered up the possession of said property to this defendant, as the trustee for said company; and in further pursuance of said surrender, the said A. E. Hovey, the mortgagor, on the 24th day of May, 1860, executed to this defendant the deed of abondonment and attornment, as set forth in complain-

ants' bill, and which is here referred to as part of this answer. Said deed of 24th May was executed upon the premises, in the personal presence of Thomas Darling, and with his full assent, knowledge, and approval.

This defendant, further answering, says that, upon said sale so being made, he credited the penal bond of said Hovey with the amount of the bill of Dr. Sloan, and the bond itself was then cancelled, in discharge of the debt, but whether this defendant delivered said bond to the obligor, A. E. Hovey, or what became of it, he cannot say, as he has made diligent search among his papers without being able to find it, and he is satisfied that it is not in his possession.

Defendant, further answering, says that, from and after said sale, neither Hovey nor Darling, both of whom remained upon the premises by the permission of this defendant, set up any claim, at law or in equity, to said property, but always recognized the right and
112 title of the defendant as trustee of the High Shoals Manufacturing Company, free and discharged from all claim of right of redemption. That Darling, as the managing agent, after said sale, sold the stock, implements, &c., upon the premises, the same belonging to the "High Shoals Mining and Manufacturing Company," paid debts as far as he could, and performed all the duties required to close up the business of his agency and connection with said company and its property. That he remained, by permission, upon the premises, so engaged, for over one year after said sale; and that A. E. Hovey remained several months after said sale, but claiming and exercising no control adverse to this defendant, but fully recognizing the title of the High Shoals Company under said purchase, until he procured friends to enable him to return to New York.

Further answering, this defendant states and says that, after said sale of 28th April, 1860, to wit, about the latter part of said year or the early part of 1861, the plaintiff, Theodore Olcott, came to North Carolina, visited said High Shoals property and this defendant; that in several conversations with said Olcott, touching said property, he never once said or intimated that he and his co-plaintiff had any title to said property, or claimed any right of redemption; on the contrary, he was fully apprized of all the facts of the sale of 28th April, 1860, and
113 the purchase by Dr. Sloan for the company, and expressed no dissatisfaction therewith, but fully admitted the rights of the company, claimed by virtue of said sale. And this defendant expressly says and charges, that said Olcott visited this defendant on two occasions, in the spring of 1861, with the view of leasing a part of said High Shoals property, for mining purposes, and the further view of purchasing the entire property, in case his mining operations should prove successful; that on his last visit to this defendant, who was then in attendance upon court in Catawba County as a practicing attorney, at the spring term, 1861, the plaintiff Olcott did solicit and procure from this defendant, as the trustee holding said property, under and by virtue of said sale of 28th April, 1860, a short lease in writing, not exceeding 12 months, of a part of said High Shoals property, and, as this defendant is informed and believes, the said plaintiff did, under said lease, make explorations for gold or other minerals thereon, but finally abandoned his lease, and in April, 1861, left the State. This defendant craves that the said plaintiff be required to produce the said lease before this honorable court.

Answering further, this defendant saith that the charge of the plaintiff, namely, that, as a part of the arrangement of the 1st January, 1859, this defendant delivered up the certificates of stock of the

114 High Shoals Manufacturing Company, this defendant answers and says that he has no recollection of any such occurrence, and disbelieves, and therefore does not admit it; that he does not believe he ever saw or had any control over such certificates, and certainly he had no authority or power to surrender them, and if such certificates are in the possession of the plaintiffs, they rightfully belong to the "High Shoals Manufacturing Company," and not to the plaintiffs. Further answering, this defendant admits that, under the direction of the "High Shoals Manufacturing Company," and for their use and benefit, he and his co-executor, Thomas Grier, did contract to sell said property, in March, 1862, to the co-defendants, John L. and R. R. Bridgers, for the sum of $65,000, of which sum $30,000 was to be and was paid in bills of the banks in North Carolina, which bills were then considerably depreciated; and that the balance of $35,000 was to be paid in specie or its equivalent in currency, in three and four years, with interest, and the title reserved until the last payment. This defendant states that no payment has been made on said balance of $35,000, except two years' interest thereon, but that it is still due and unpaid.

He further answering, states that, upon their purchase, in March, 1862, the said Messrs. Bridgers immediately entered into the full possession and enjoyment of said property, and operated the same until they sold out to Charles Wilkes, their co-defendant, at the time
115 set forth in their answer to plaintiffs' bill, to which answer reference is here made as containing, as this defendant believes, a true and correct statement of that transaction and the operations of said Wilkes since that time.

Further answering, as to that part of plaintiffs' bill which charges that the defendants, in the purchase of April 28th, 1860, desired to reinvest themselves with the title for a nominal sum, this defendant denying, as he has hereinbefore done, that he so purchased as charged, yet expressly denies that the High Shoals Manufacturing Company has made money or saved itself whole in the transaction; that P. W. Groot, and those claiming under him, held and occupied said property from the 24th February, 1854, until May, 1860, over six years; that said property was valuable and used mainly for timber, ores, and other materials in operating the rolling-mills, forges, furnaces, and other machinery situate thereon; that during said period, in conducting said operations, timber to the value of several thousand dollars was cut down and destroyed, and ores to the value of several thousand dollars were dug up and used, and also the mills, machinery, dwellings, buildings, and fences were allowed to go to decay, to the great loss and injury of said property; that the amount of purchase-money paid by Groot was $25,000, and the amount paid by A. E. Hovey and E. S. Stephenson, as aforesaid, was $7,858, besides two years' interest
116 on the Groot debt, in all, less than $40,000; that as a compensation therefor, the said parties occupied and operated the property for six years and some months, in the manner and to the great injury of the property, as before described; that before the sale to Groot, the company was leasing out said property, for manufacturing purposes alone, for $5,000 per annum, but when the High Shoals Company regained possession, in May, 1860, under the sale of 28th April, the property was so injured and out of repair that they were unable to lease out the manufacturing and most valuable part of the same, and were able to rent out the farming lands in 1860 and 1861 for only a small sum, viz, $500, which is all they realized before the sale to their co-defendants, R. R. and J. L. Bridgers.

Further answering, this defendant, from reliable information, says, and so expressly charges, that the co-defendant, Charles Wilkes, corruptly and fraudulently instigated and procured this suit to be brought by and in the name of the plaintiffs, for the purposes and in the manner set forth in the answer of the co-defendants, R. R. and J. L. Bridgers, and this defendant fully conceiving in that part of their answer relating to the said corrupt and fraudulent conduct and purposes of the said Charles Wilkes, adopts the answer of his co-defendants, R. R. and J. L. Bridgers, as his own answer.

117 This defendant insists that said complainants have not, by their said bill, made such a case as entitles them, in a court of equity, to any discovery from this defendant, or to any relief against him, as to the matters contained in said bill, or any of them, and that any discovery which has been made by this defendant touching the matters complained of in said bill, or any of them, cannot be of any avail to said complainants for any of the purposes for which a discovery is sought by said bill against this defendant, nor entitle the complainants to any relief in the court touching any of the matters therein complained of; and this defendant prays that he may have the same advantage of this objection as if it had been taken by way of demeanor or plea.

This defendant, having answered all the matters of fact alleged and charged against him, prays hence to be dismissed, with his costs, &c.

MOORE, BOYDEN & BAILY,
Sol's.

William P. Bynum makes oath that the facts stated in the foregoing answer as of his own knowledge are true, and the rest he believes to be true.

W. P. BYNUM.

Sworn & subscribed before N. J. Riddick, clerk of the circuit court of the United States for the district of North Carolina, this 13th day of June, A. D. 1868.

N. J. RIDDICK, *Clerk.*

118 *Answer to amendments of bill.*

Further answering, this defendant says that the plaintiff had full and ample notice of the time of the sale of the 25th April, 1860, both from this defendant and from Thomas Darling, the agent of the plaintiff who resided upon the premises; and in fact, said sale was postponed to the 28th April, at the instance and request of the plaintiff and E. S. Stephenson, as will appear from the annexed copy of a letter received from them and prayed to be taken as part of this answer.

Further answering, this defendant admits that said High Shoal property was sold by him on the 28th April, in solido, for the reason that it was acquired and used by the High Shoal Manufacturing Company, in solido, and as one entire and indivisible property, and was sold both to P. W. Groot in 1854, and to A. E. Hovey on the 1st January, 1859, as one entire property, and reconveyed by them in mortgage as such; and this defendant was advised by counsel learned in the law, that he had no right, under the said mortgage, to sell a part only of said property; that said company was incorporated and acquired said property for the manufacture of iron and iron fabricks, having forges and rolling-

119 mills on one part of the land, and furnaces on another part, six

miles from the rolling-mills, and on divers other parts of the land, and several miles asunder, were located the iron-ore beds, which supplied the mills and furnaces, while the great body of the land was poor and absolutely necessary, and used, to carry on the extensive operations, by the supply of coal and timber, the tillable land being used for agricultural purposes, the entire property having been intended and used by the corporation as a self-sustaining enterprise. This defendant is fully satisfied that any division of said property, as suggested in the plaintiff's bill, would have impaired the value of the property and injured its sale.

Further answering, this defendant alleges that notice of said sale, to be made in solido, was had by the plaintiff prior thereto, and no objection was made by him on that account.

Answering further, this defendant denies that said property is situated in a remote and unfrequented part of the country, and sold at a sacrifice on that or any other account; said property is located about twenty-five miles from the flourishing city of Charlotte, and five miles from the town of Lincolnton; is near a railroad, and in the midst of a large manufacturing and populous community.

120 This defendant further answers and says, that great pains were taken by him to give the most extensive notice of said sale, and to stimulate individual capitalists and companies to be present and bid for said property; that this defendant applied personally to many gentleman of capital and enterprise, to purchase said property, or form a company for that purpose; and in fact, he did induce several capitalists to attend said sale of 28th April, with a view to purchase, but after viewing the property they determined to bid only $35,000 for it as the farthest limit for a safe investment, which was about $8,000 less than the debt upon it, and the sum at which it was bid off by the company.

This defendant positively denies that the High Shoals Manufacturing Company were desirous of re-investing themselves with the title of said property at a nominal or any other sum, but on the contrary they were greatly adverse to purchasing the same, as over one-half the stock had fallen into the hands of executors and assignees who were anxious as well as bound to discharge themselves of their trusts, which required the sale of the property.

Further answering, this defendant states with confidence, that the sum of $43,200, at which said property was bid off by W. Sloan,

121 for the company, at the sale of the 28th April, was the fair and full cash value of said property in its then dilapidated condition, and that more could not have been realized by dividing it into lots to suit purchasers of small means, as suggested in plaintiffs' bill; for, previous to said sale, and anticipating the probable necessity of buying in the property to save the debt, this defendant and others of the company, fully considered the question whether they could realize their debt by subdividing and selling the property in lots to suit purchasers, and the result of their investigations left the matter in such doubt that they determined to, and accordingly did, make every exertion to get up a company to bid a sum equal to their debt, that the property might not fall on their hands.

Further answering, in order to shew the groundlessness of the plaintiffs' charge that said property was bid off on 28th April at a grossly inadequate price, it is only necessary to state and shew that A. E. Hovey, on the 28th Dec'r, 1858, purchased said property at the sum of $47,858, as is elsewhere more fully explained in this answer, whereas W. Sloan,

for the company, on the 28th April, 1860, bid off said property at $43,-
200, which was only $4,658 less than the sum to be given by Ho-
122 vey; and as an ample compensation for the difference, the said
A. E. Hovey had the exclusive possession and enjoyment of said property for nearly two years next ensuing his purchase, which, at a reasonable rent, was of greater value than the amount of purchase-money he was actually out.

To the plaintiffs' allegation that said entire High Shoals property was exposed to sale on said 28th April, when only the sum of $14,000 was due, this defendant answers and says that the bond of A. E. Hovey was given for the penal sum of $80,000, conditioned for the payment of $40,000, payable in three equal instalments, respectively on the 1st January, 1860, 1st July, 1860, and 1st January, 1861; and the mortgage given by the said Hovey to secure said bond, expressly provided that, on failure to pay the first or any subsequent instalment, the mortgagee should enter and sell the property conveyed; a copy of said mortgage filed by the plaintiff in this case is here referred to as a part of this answer.

Further answering that part of plaintiffs' bill which alleges a purchase by him of the interest of E. S. Stephenson in said High Shoals property prior to his death, this defendant answers and says, that he
has no knowledge of such purchase, and is informed and believes
123 and so charges, that said plaintiff paid no valuable or other considerations to the said E. S. Stephenson for his alleged interest in said property; and he is further informed and believes and so charges, that the plaintiff paid no part of the sum of $7,858, which was paid on the purchase of said property by A. E. Hovey, as before set forth, and in fact that said plaintiff has never paid a dollar towards the purchase of said property, either to the High Shoals Company or to E. S. Stephenson, and that his only connection with said property has been as agent and manager for others, with a contingent interest in the proceeds of the sale of the same, if a successful speculation were made in the enterprise.

To that part of plaintiffs' amended bill which alleges that only a single bid was made at the sale of 28th April, this defendant answers that he does not admit the charge, and while he is not positive as to the fact, he is of the decided belief that several bids were made by other parties before the property was finally knocked down to W. Sloan, as agent for the company.

W. P. BYNUM.

Sworn and subscribed before me Dec'r 9th, 1868.
N. J. RIDDICK, *Clerk*

124 *Answer of Thomas Grier.*

In the circuit court of the United States for the district of North Carolina, June term, A. D. 1868.

The separate answer of Thomas Grier to the bill of complaint of Theodore Olcott & Eben S. Stephenson, filed against himself and others in this honorable court:

This defendant, saving and reserving, &c., for answer thereto, or so much thereof, &c., answering, says that true it is, Andrew Hoyle was president of the High Shoals Manufacturing Company, a corporation chartered by the State of North Carolina; that he died in the latter

part of the year 1856, having first duly made and published in writing his last will and testament, which was duly admitted to probate at February sessions, 1857, of Gaston County court; and that, at the same term, this defendant and W. P. Bynum, his co-defendant, who were therein nominated the executors thereof, duly qualified as
125 such, and entered upon the discharge of the duties of their said office.

This defendant, further answering, says that it is also true, as stated by his co-defendant and co-executor, Bynum, that he and said Bynum divided the labors and duties of their said office between themselves, and in such division the sole management of the matters connected with the High Shoals property was assigned to his co-executor, the said Bynum, and this defendant had no connection therewith except in matters of form; that this defendant joined in the execution of the deed to defendant, Hovey, on 1st January, 1859, and, jointly with said Bynum, accepted the trust deed executed by said Hovey, of the same date, and also his mortgage of the 3rd of January, 1859; also his deed of abandonment and attornement of the 24th of May, 1860; that, of all the other matters connected with the disposition of the said High Shoals property, he has no knowledge, except the sale of 28th of April, 1860, which is correctly stated by said Bynum in his answer, but refers to the answer of his co-defendant, Bynum, as containing his information
125½ concerning the same, which he believes to be true, and adopts the same, so far as his information and belief extends touching those matters, as his own.

This defendant insists that said plaintiffs have not, by their said bill, made such a case as entitles them, in a court of equity, to any discovery from this defendant, or to any relief against him, as to the matters contained therein; and that any discovery which has been made by this defendant, touching the matters complained of in said bill, cannot be of any avail to said complainants for any of the purposes for which a discovery is sought by said bill against this defendant, nor entitled the plaintiffs to any relief in this court touching any of the matters therein complained of; and this defendant prays that he may have the same advantage of this objection, as if it had been taken by way of demurrer or plea.

And this defendant having fully answered, &c., prays to be hence dismissed, &c.

MOORE, BOYDEN & BAILEY, *Sol's.*

126 The defendant, Thomas Grier, makes oath before me, N. J. Riddick, clerk of the circuit court of the United States for the district of North Carolina, that the facts stated in the foregoing answer, as of his own knowledge, are true, and the rest he believes to be true.

THO'S GRIER.

Sworn & subscribed to before me this the 13th day of June, A. D. 1868.

N. J. RIDDICK, *Clerk.*

127 *Answer of William Sloan.*

In the circuit court of the United States for the district of North Carolina. June term, A. D. 1868.

The separate answer of William Sloan, of Gaston County, defendant, to the bill of complaint of Theodore Olcott and Eben S. Stephenson, filed against Charles Wilkes and others in this honorable court.

This defendant, saving and reserving, &c., for answer to said bill, or

so much thereof, &c., answering, says that he has no knowledge of the execution of the deeds from Andrew Hoyle to P. W. Groot, the trust deed of Groot to Hoyle, the deed from his co-defendants, Bynum and Grier, to Hovey, and the trust deed from Hovey to Bynum and Grier, and the mortgage from said Hovey of the 3rd of January, 1859; but he doubts not the same, and admits their due execution; that, as to
128 the alleged deed from said *said* Hovey to the plaintiffs, of the 8th of January, 1859, this defendant has no kno'ledge or information. In this connection this defendant states that he had frequent intercourse and conversations with the said Hovey, Olcott, and Darling, from the date of such alleged deed up to the date of their respective departures, as hereinafter stated, from time to time; that said Hovey left in the summer or fall of 1860; Olcott was a guest of this defendant for several weeks at the house of said defendant, he then residing upon said High Shoals property as a tenant of the company, and left in April, between the 10th and 15th of that month, in the year 1861, and the said Darling left in June or July, 1861; that in all of his intercourse with these parties, no allusion was ever made to the existence of any such deed in any way.

This defendant, further answering, says that, as to the several matters connected with the said High Shoals property, before and since the sale of the 28th April, 1860, he has no knowledge, except the deed of abandonment, &c., of 24th May, 1860, to which he is a witness, but, from reliable information, contemporaneous and otherwise, he believes the statements contained in the answer of his co-defendant, Bynum, to be true in that behalf, and adopts them, according to such belief, as his answer thereto. Further answering, this defendant says that, in the spring of 1861, when plaintiff, Olcott, visited him, as aforesaid, he
129 brought in company with him a man named Muir, representing him to be a capitalist, and stated that he came with a view of purchasing the High Shoals property, or a portion thereof, from the "High Shoals Manufacturing Company," for mining purposes; that said Olcott and Muir went to Catawba court to see defendant, Bynum, with a view to obtain a leave with a privilege of purchasing said property; and, on their return, informed this defendant that they had obtained that leave.

This defendant, further answering, states that, during this visit, in frequent conversations the plaintiff Olcott stated that he was fully aware of the sale of 28th April, 1860; that he considered that all right of redemption was abandoned and distroyed, and that he frequently expressed the hope to raise the money to buy said property, as it was then in market, and the title revested in said High Shoals Manufacturing Company.

Further answering, this defendant says that, since the war ended, he has received letters from plaintiff Olcott, and in one letter he makes inquiry as to who owned the said property, and proposing to purchase said property jointly with this defendant *or* speculation; and in none of said letters did plaintiff Olcott set up any claim to said property, or allude to the existence of any such claim.

Further answering, this defendant says that, true it is, as stated
130 in the bill, this defendant bid off said property at the sale of the 28th of April, 1860, at between $40,000 and $45,000, the bid made being sufficient to cover the computed balance due; that it is false, as charged in the bill, that this defendant purchased or bid off said property as agent of defendants Bynum and Grier; on the contrary, th*eir* defendant bid off said property, at said sale, as the agent

and under the direction of the said "High Shoals Manufacturing Company," being directed by said company, at a meeting thereof on the same day of the sale, and previous thereto, to run up the property to a sum sufficient to cover the debt and costs, and prevent the same from being sold at a sacrifice; that the said company were exceedingly anxious that some third party should buy the property, as, from various considerations, it could not be operated successfully by said company, and that exertions had been made to procure the attendance of capitalists at said sale; that several were present, and several bids were made by them.

This defendant, further answering in this connection, states that the said Darling was in constant correspondence with the "High Shoals Mining and Manufacturing Company," a corporation chartered by the State of New York, as this defendant has been informed and be-
131 lieves; that the said Darling was the agent of said company, resident on the property, and, as this defendant understood from the said Darling and the plaintiffs, the plaintiff Stephenson was the president, and Olcott the secretary of said company; that the said Darling would frequently exhibit his letters from Stephenson & Olcott praying indulgence and extension of credit; that this defendant always understood from said parties that neither of them ever claimed any private or individual interest of any kind in said property, but that they were acting throughout as agents of said New York company in some or other capacity; that, after the said sale, this defendant rented the property from the said Bynum and Grier, considering them as trustees for the "High Shoals Manufacturing Company," and that said Darling remained on the premises, as a boarder with this defendant, by his consent, and to wind up the affairs of said New York company, not claiming any interest adverse to High Shoals Manufacturing Company; that, in giving receipts and acquittances, the said Darling required the name of said New York company by said Darling as agent.

Further answering, this defendant says from reliable information received by him, he believes that the defendant Wilkes caused this suit to be instituted for his own personal benefit, and that he has
132 bought up the pretended claims of plaintiffs with the view of ridding himself indirectly from his contract with the Messrs. Bridgers.

Further answering, this defendant says that, having bid off said property for the said company as aforesaid, he did not take any deed, as he regarded that the legal title of defendants Bynum and Grier would be regarded, and was then regarded on all hands, as subservient to the trust for the said High Shoals Manufacturing Company, and that, as the said company were cestui que trust as to either, there was no necessity that a deed should be made. He has received a deed prior to the filing of his answer.

And this defendant, having fully answered, prays to be hence dismissed, &c.

MOORE, BOYDEN AND BAILEY,
Sol's.

William Sloan, the defendant, makes oath before me, N. J. Riddick, clerk of the circuit court for the district of North Carolina, that the facts stated in the foregoing answer, as of his own knowledge, are true, and the rest he believes to be true.

W'M SLOAN.

Sworn and subscribed before me this 13th of January, A. D. 1868.
N. J. RIDDICK, *Clerk.*

133 Further answering, this defendant says that he has read the additional answer of his co-defendant Bynum to the amendments made to the bill, and he adopts the same as his own, as to all the points embraced in it, as fully as if the matters therein set forth were herein repeated.

That, as to the charge that only one bid was made, this defendant says that he cannot now remember distinctly, but his impression is that there were several bids made.

W'M SLOAN.

Sworn and subscribed in open court this the 17th day of December, 1868.

N. J. RIDDICK, *Clerk.*

134 And on the last-mentioned day, to wit, the first Monday in July, 1868, rule day, the said Theodore Olcott, by his solicitor, W. A. Graham, makes replication to the answers aforesaid as follows:

Replication.

The replication of Theodore Olcott, plaintiff, to the answers of Charles Wilkes, J. L. Bridgers, R. R. Bridgers, B. B. Barron, W. P. Bynum, Thomas Grier, and William Sloan, defendants.

This repliant, saving, &c., for replication to the answers of the defendants aforesaid, says that he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by this repliant without this, that any other matter or thing, in any of said answers contained, material or effectual in law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove, as this court shall direct. And he humbly prays as in and by his said bill he has already prayed.

135 And the defendants R. R. Bridgers, J. L. Bridgers, B. B. Barron, and Thomas Grier, respectively, adopt their answers to the original as their answers to the amended bill; and the complainant adopts his replication to the original answers as his replication to the amended answers of the several defendants last aforesaid.

And thereupon, on motion of the complainant, leave is granted to him to take the testimony of the defendant A. E. Hovey, to be used as evidence in this cause, subject to any just exceptions; and it is ordered that commissions issue to both complainant and defendants to take testimony.

And at rules, on the 1st Monday, October, 1868, it is ordered that the time for taking testimony be enlarged.

Afterwards, to wit, at rule day, on the first Monday in April, 1869, the complainant files as evidence in the cause a copy of a deed from A. E. Hovey to Eben S. Stephenson and Theodore Olcott, with the evidences of probate and order of registration thereof; which said deed, evidences, and order are in the words following, to wit:

136 This indenture, made the eighth day of January, in the year of our Lord one thousand eight hundred and fifty-nine, between Aaron E. Hovey, of the county of Gaston and State of North Carolina, party of the first part, and Eben S. Stephenson and Theodore Olcott, of the city and county and State of New York, parties of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of forty-eight thousand five hundred dollars to the said party of the first part in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, hath given, granted, bargained, sold, aliened, and conveyed, and doth by these presents, give, grant, bargain, sell, alien, and convey unto the said parties of the second part, in their actual possession now being, and to their heirs and assigns forever, the several tracts, pieces, and parcels of land known as the High Shoals lands, situated in Gaston, Lincoln, and Cleaveland Counties, in the State of North Carolina, upon the waters of the south fork of the Catawba River, Long Creek, and other streams, containing, by estimation, fourteen thousand eight hundred and
137 seventy-three and a half acres, be the same more or less; (for a more complete and perfect description of said lands by metes and bounds, reference is hereto had and made to a deed of conveyance from the High Shoals Manufacturing Company to Philip W. Groot, which said deed bears date the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and fifty-four, and is recorded and registered in the county of Gaston in book No. 1, page 696 to 702, also recorded and registered in the county of Lincoln in book No. 42, page 387 to 391,) and also all other lands which were conveyed or intended to be conveyed to the said party of the first part by William P. Bynum and Thomas Grier, executors of Andrew Hoyle, deceased, trustee of the High Shoals Manufacturing Company, a corporation created by the legislature of North Carolina, by deed bearing date the first day of January, one thousand eight hundred and fifty-nine, reference to which said deed is hereby had and made, together with all and singular the mines, minerals, ores, manufactories, furnaces, mills, buildings, machinery, and other things on or in any way appertaining to said property, and all and singular the hereditaments and appurtenances to the said several pieces of land belonging or in any way appertaining, and all the tools, implements, machinery, machines, and other property, now on the said premises, or in any way connected with the use of the same: To have and to hold the said several pieces, parcels, and tracts of land and other property, with the hereditaments and appurtenances, to the said par-
138 ties of the second part to the sole and only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns forever, subject, nevertheless, to a mortgage on the said property, executed by the said party of the first part, on the first day of January, one thousand eight hundred and fifty-nine, to William P. Bynum and Thomas Grier, in trust for the stockholders of the High Shoals Manufacturing Company, in the State of North Carolina, for the securing the payment of forty thousand dollars with interest.

And the said party of the first part, for himself, his heirs, and personal representatives, does hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, that the said party of the first part is now seised of a good, sure, and indefeasible estate in fee-simple absolute, of and in all and singular the lands, tenements, and hereditaments above mentioned, and every part and parcel thereof, and has good right and lawful authority to grant and convey the same in

manner aforesaid, and the said parties of the second part, their heirs and assigns, shall peaceably and quietly possess, hold, and enjoy the said property, and every part and parcel thereof, against all and every person or persons lawfully claiming or to claim the same or any part thereof.

And the said party of the first part does hereby covenant and agree to and with the said parties of the second part, their heirs, executors, administrators, and assigns, that the said party of the first part
139 will, when requested, make, execute, and deliver all such further deeds, conveyances, instruments, and assurances, except covenants of title, as may be deemed necessary or proper for the purpose of more perfectly conveying and assuring all and singular the lands and other property aforesaid to the said parties of the second part, their heirs and assigns forever.

In witness whereof the party of the first part has hereunto affixed his hand and seal the day and year first above written.

(Signed) A. E. HOVEY. [L. S.]

Witness:
THOMAS DARLING.
AUGUSTUS SCHONBERG.

140 STATE OF NEW YORK,
City and County of Albany, ss:

Thomas Darling, being duly sworn, deposes and says that he resides in the village of Flushing in said State; that he is one of the subscribing witnesses to the execution of a deed bearing date the 8th day of January, 1859, made by Aaron E. Hovey to Eben S. Stephenson and Theodore Olcott; that the foregoing is a true copy of the said deed in all its parts; that he was present and saw the said original deed executed and delivered by said Aaron E. Hovey; that he was well acquainted with said Aaron E. Hovey, and knew him to be the grantor named and described in and who executed the said original deed; and that, on such execution of said deed by him, this deponent signed his name as a witness of the execution thereof.

(Signed) THOMAS DARLING.

Sworn to and subscribed before me this 20th February, 1868.
(Signed) R. W. PECKHAM,
Just. Sup. Court.

141 STATE OF NEW YORK,
City & County of Albany, ss:

Thomas Darling, being duly sworn, doth depose and say that he is a resident of Flushing, in the county of Queens, and State of New York; that he, this deponent, is one of the subscribing witnesses to the execution of a deed bearing date the eighth day of January, 1859, made by Aaron E. Hovey, then of the county of Gaston, in the State of North Carolina, to Eben S. Stephenson and Theodore Olcott, of the city & county & State of New York, conveying the several tracts, pieces, and parcels of land known as the High Shoals lands, situated in Gaston, Lincoln, and Cleveland counties, in the State of North Carolina, upon the waters of the south fork of the Catawba River, Long Creek, and other streams, containing, by estimation, fourteen thousand eight hundred and seventy-three and one-half acres, be the same more or less, and that the foregoing is a true copy of the said deed in all its

parts, and of the whole of said deed ; that he, this deponent, was present when the said deed was executed, at High Shoals aforesaid, at the time the said deed bears date, and saw the said original deed
142 executed, and heard the same acknowledged by the said Aaron E. Hovey; and that, on such execution of the said deed by the said Hovey, he, this deponent, signed his name as a witness to the execution thereof; that, after the said deed was so as aforesaid signed & acknowledged by the said Hovey and witnessed by this deponent, the same was delivered to the said Olcott & Stephenson, the grantees in the said deed named, by the said Aaron E. Hovey, and taken possession of by the said Theodore Olcott; that he, this deponent, was well acquainted personally with the said Aaron E. Hovey, and signed the name of this deponent as a subscribing witness to the execution of the aforesaid deed at the request of the said Aaron E. Hovey, knowing him at the time to be the individual named in the said deed as grantor of the premises therein described, and who executed the said deed; and that one Augustus Schonberg also, at the same time with this deponent, signed his name as a subscribing witness to the execution of the said original deed.

And this deponent further says that, since the execution & delivery of the said original deed as aforesaid, he, this deponent, has
143 never had the custody, control, or possession of the same, and does not know where the said original deed now is, nor whether the same is now in existence or not, nor where the same can be found if in existence; but this deponent is fully satisfied and verily believes that the foregoing is a true copy in all respects of the said original deed so executed and delivered by said Aaron E. Hovey to the said Olcott & Stephenson as aforesaid, and of the whole of the said original deed.

THOMAS DARLING.

Sworn to & subscribed before me this 22nd day of September, 1868.

R. W. PECKHAM,
Just. Sup. Court.

STATE OF NEW YORK,
City & County of Albany, ss :

Aaron E. Hovey, being duly sworn, says that he resides in South Boston, in the county of Suffolk, & State of Massachusetts; and he, this deponent, did, on or about the eighth day of January, 1859, execute & acknowledged a deed of conveyance to Theodore Olcott
144 and Eben S. Stephenson, of New York, as the bargainers or grantees therein named of certain lands in North Carolina, known as the High Shoals lands; that, immediately after the execution of said deed, he, this deponent, delivered the same to Theodore Olcott, one of the grantees therein named, at High Shoals aforesaid, and has never, to this deponent's recollection, seen the said deed since, nor does he know where the same is or may be found.

And this deponent further says that he verily believes the foregoing to be a true & correct copy of said original deed, & knows the description of the lands therein mentioned to be the same conveyed by this deponent in & by the said original deed so as aforesaid executed by this deponent & delivered to the said Theodore Olcott.

And this deponent further says that the said original deed so as aforesaid executed by this deponent to said Theodore Olcott & Eben S. Stephenson was witnessed as to the execution thereof by this deponent as aforesaid, by one Thomas Darling, whose deposition is hereunto an-

nexed, and by one Augustus Schonberg, as subscribing witnesses
145 thereto, at the request of this deponent, and who were present at the delivery of the said deed by this deponent to the said Theodore Olcott as aforesaid.

And this deponent further says that he does not know where the said deed is, nor whether the same is lost, mislaid, or destroyed; that he has not to his knowledge ever seen the same since the same was delivered to the said Olcott by this deponent, and has no knowledge further in relation to the said deed or the custody of the same than as above stated.

A. E. HOVEY.

Subscribed & sworn to before me this 17th day of September, 1868.
R. W. PECKHAM,
Just. Sup. Court.

STATE OF NEW YORK,
City & County of Albany, ss:

Theodore Olcott, being duly sworn, doth depose and say that he is a resident of the city and county of Albany, & State of New York; that he, this deponent, knows Aaron E. Hovey, and did know the said Hovey in January, 1859; that he, the said Aaron E. Hovey, on
146 or about the eighth day of January, 1859, for a good and valuable consideration therefor, paid to the grantors of said Hovey by this deponent and E. S. Stephenson, executed and delivered to this deponent a deed of certain tracts or parcels of land, known as the High Shoals lands, situated in Gaston, Lincoln, & Cleveland counties, in the State of North Carolina, containing, by estimation, fourteen thousand eight hundred seventy-three and one half acres of land, more or less; that he, this deponent, together with one Eben S. Stephenson, (who has since deceased,) were the bargainers or grantees named in the said deed, & to whom the premises therein described were conveyed by the said deed; that he, this deponent, was present at High Shoals aforesaid when the said deed was executed by the said Hovey, and saw the same executed by him, and at or about the day when the said deed bears date; that, after the said deed was so executed by said Aaron E. Hovey, the same was delivered by him, the said Hovey, to this deponent, and that the same has never been delivered by this deponent to any other person, nor has the property therein described been
147 conveyed by this deponent to any other person; and that the interest of the said Stephenson in the said premises in said deed mentioned and described was, after the execution of the deed so as aforesaid executed by said Hovey to this deponent & said Stephenson, sold & conveyed by said Stephenson to this deponent.

And this deponent further says that, after the execution and delivery of said deed by said Hovey to this deponent, as aforesaid, the same was deposited by this deponent among & with other valuable papers in a safe wherein deponent was accustomed to deposit such papers, & that the said deed, together with other papers connected with said purchase of the said High Shoals lands, and deposited with said deed, have been either stolen or lost therefrom, or mislaid; that he, this deponent, has made & caused to be made diligent search for the said deed among all of his valuable papers, and has carefully and thoroughly searched for the same in all places where the same might, by possibility, have been placed by this deponent, and has been and is still unable to find the same, and does not know where the said deed is, or can be found,

148 if the same is in existence, and verily believes that the said deed is lost or destroyed.

And this deponent further says that the said Stephenson was cognizant of the place where the said deed and other valuable papers were deposited and kept by this deponent, and that he. this deponent, applied to the said Stephenson, in his lifetime, to know if he, the said Stephenson, had the possession of or any knowledge of the same, and was informed by said Stephenson that he had not the same in his possession or control, and did not know where the same were or could be found, if they were in existence.

And this deponent further says that the said deed was delivered to this deponent personally, by the said Hovey, and that he, this deponent, verily believes that the said Stephenson never saw the said deed, nor had possession of the same from or after the day of the delivery of the same to this deponent as aforesaid; and that he, the said Stephenson, departed this life on or about the 6th day of May, in the year 1868, having, as aforesaid, previously conveyed to this deponent all of his interest in the said premises mentioned and described in the deed,

149 so as aforesaid executed and delivered by said Hovey to this deponent and the said Stephenson.

And this deponent further says that the foregoing is in all respects a true and correct copy of the said original deed of the said lands so as aforesaid executed and delivered by the said Hovey to this deponent, and of the whole of said deed, and the description of the lands therein contained is a true & correct copy, in all respects, of the description of the lands in said original deed mentioned, and which were thereby conveyed to this deponent and his co-grantee, the said Stephenson, and that the said original deed was copied personally by this deponent in the year 1859, at High Shoals aforesaid, at or about the time of delivery of the said original deed to this deponent as above mentioned, as a convenient reference for this deponent.

And this deponent further says that Augustus Scho'berg, the other subscribing witness to the said deed, accordingly, as this deponent has been informed and believes, was, at the last accounts heard from him by this deponent, a soldier in the Army of the United States, but

150 where he can now be found, or where, if living, he now is, this deponent does not know; nor has he, to his knowledge, any means of ascertaining, or of procuring his testimony as a subscribing witness to the execution of the said deed. And further he says not.

T. OLCOTT.

Sworn to & subscribed before me this 17th September, 1868.

R. W. PECKHAM,
Just. Sup. Court.

Theodore Olcott, ex-parte, to the court.

AT CHAMBERS, *Octo. 8th*, 1868.

It appearing, upon the proofs exhibited in this case before me, upon ex-parte application of the complainant, that sufficient cause exists for the registration of the conveyance herein set forth, it is—

Ordered, That the same, with this certificate, be registered without prejudice, in the counties where the land lies.

S. W. WATTS,
Judge Sixth Judicial District.

151 STATE OF NORTH CAROLINA,
Lincoln County:

I certify that the foregoing conveyance, affidavits, depositions, & certificates, was duly registered in the register's office of Lincoln County, in book No. 45, pages 273, 274, 275, 276, 277, 278, and 279, on the 16th day of October, A. D. 1868.

THOMAS W. ROBINSON, *Reg'r.*
By JNO. D. SHAW, *Deputy.*

STATE OF NORTH CAROLINA,
Gaston County:

This deed, with certificates, &c., was duly registered in the register's office for said county, in book No. 3, pages 661 to 667, Dec'r 30th, 1868.

CYRUS C. WITHERS.
Reg. of Deeds.

152 UNITED STATES OF AMERICA:

By Reuben E. Fenton, governor of the State of New York:

(THE GREAT SEAL OF THE STATE OF NEW YORK.) It is hereby certified that Rufus W. Peckham was, on the day of the dates of the annexed certificates subscribed by him, justice of the supreme court of the State of New York for the third judicial district, and by law duly authorized to grant the same; that the same are in due form; that the signatures of said justice to said certificate are in his proper handwriting, and are genuine; and that full faith and credit may and ought to be given to his official acts.

In testimony whereof the great seal of the State is hereunto affixed.

Witness my hand at the city of Albany, the twenty-third day of September, in the year of our Lord one thousand eight hundred and sixty-eight.

R. E. FENTON.

Passed the secretary's office the 23d day of September, 1868.

H. A. NELSON,
Sec't. State.

153 And on the rule day last aforesaid, the complainant also files as evidence in the cause a letter from the defendant Bynum to Messrs. Wilson and Osborne, dated August 31st, 1867; and also a copy of the advertisement of the sale of the High Shoals property by the defendants, Bynum and Grier, dated January 31st, 1861, with certificate of W. J. Yates, and the admission by the defendants' attorneys that the same may be read as a deposition, which said letter, advertisement, certificate, and admission, are in the words following, to wit:

154 LINCOLNTON, *Aug. 31st*, 1867.

Messrs. WILSON & OSBORNE:

DEAR SIRS: I have received a letter from Messrs. Bridgers, under cover of one from Capt. Wilkes, requesting me to send you an abstract of title of the H. Shoals property.

Judge Osborne will remember the title of the old co. when the sale was made to P. W. Groot. I will therefore state only, that the H. S. Co. was an incorporated co., &, as such, sold to P. W. Groot, by its president, A. Hoyl, taking a mortgage for the purchase-money "to him and

his heirs in trust for the" late stockholders of the co., empowering "him, his executors & assigns," to enter, sell, & make title on default of pay't.

Hoyl died, making Grier and myself his executors, & authorizing the sale of all his land & property of all kinds, with certain immaterial exceptions. Default of payment was made before Mr. Hoyl's death, & we, his executors, under the provisions of the mortgage, entered
155 & sold. Under an arrangement with the mortgagors, A. E. Hovey, for them became the purchaser, & we executed a deed to him, taking a similar mortgage to the one we before had. A. E. Hovey made default, & we again entered & sold, James H. White becoming the purchaser, really for the old Hoyl Co. No title has yet been made by Grier & myself to White, & from him to the original co. So the precise fact is, that, technically, the title is in Grier & myself, as mortgagees from A. E. Hovey, who has never paid the debt.

I think there can be no difficulty on this point, as it was an express arrangement between Hovey & the old co. that they should take back the property for the debt, & it was bid off under that agreement; &, to put the matter at rest, I took from Hovey, after our purchase, an acknowledgement in writing, that we were the owners of the property under that purchase, & agreeing to hold under as a tenant, & to surrender possession when we desired. He lived on the place some months after, then left & abandoned the property & all claim thereto. So we think the absolute title is in us, 1st, as purchasers under the
156 mortgage sale, &, 2d, by the abandonment, surrender, and attornment of the mortgagor.

I suppose the other difficulty you have is whether Grier & I had a power of sale under the mortgage from Groot to Hoyl. I did not trust to my own judgement on that question, but took the advice of eminent counsel, who were clear that we were authorized by the very words of the mortgage to enter and sell. Judge Osborne, I remember, concurred in that opinion.

I will at any time exhibit all the papers in my possession to your inspection.

The chain of title, prior to Groot's purchase, is, I think, undoubted, & I will not, unless requested, trace it any farther back.

I have not mentioned dates, because I have not the papers before me, & do not think it is material now.

I will, in conclusion, state that we will make title to Capt. Wilkes on his complying with his terms of purchase from Messrs. Bridgers, or on payment of balance due us from Bridgers, if he so directs.

Very respectfully, &c.,

W. P. BYNUM.

157 *Lands, gold-mines, water-powers.*

According to the terms of a mortgage to us made by A. E. Hovey, esq., we will sell for cash, at the High Shoals, Gaston County, N. C., on the 8th day of March, 1860, that extensive and valuable property known as the "High Shoals," consisting of 13,000 acres of land, and embracing gold-mines, iron-ore banks, and the best water-power in the State.

This property lies in the counties of Lincoln and Gaston, on both sides of the south fork of the Catawba River, commands the entire stream, and a fall of eighteen (18) feet.

The gold-mines on the premises are now being operated, and are known to be of great value and extent.

W. P. BYNUM,
THO'S GRIER,
Mortgagees.

JANUARY 31ST, 1860.

DEMOCRAT OFFICE,
Charlotte, N. C., June 12th, 1869.

I certify that the above is a true and correct copy of an advertisement published in my paper on the 31st of January, 1860.

W. J. YATES,
Editor Charlotte Democrat.

158 (Endorsed:) Statement of W. J. Yates, editor of Charlotte Democrat. Admitted to be read as a deposition. Boyden & Bailey, of counsel for defendants.

Thereupon the cause is continued, and further day is given to the parties to take testimony.

Afterwards, to wit, at the term of the said circuit court, held on the first Monday in June, 1869, the complainant returns into court the depositions of him, the said complainant, Theodore Olcott, and of the defendants, A. E. Hovey and Thomas Darling, which said depositions are opened in open court by the clerk, and are contained in the words and figures following, to wit:

159 Circuit court of the United States for the district of North Carolina.

THEODORE OLCOTT, COMPLAINANT,
against
CHARLES WILKES, ADMIRAL IN THE NAVY OF the United States and others, defendants.

Be it remembered that on the 21st day of May, A. D. 1869, at the city of Albany, and county of Albany, in the State of New York, Theodore Olcott personally appeared before me, Amaser J. Parker, j'r, a commissioner appointed under the laws of the United States, to take affidavits and acknowledgements of bail, and made oath that he, the said Theodore Olcott, the plaintiff in the above-entitled suit, now depending in the United States court for the district of North Carolina, wherein Theodore Olcott is plaintiff and Charles Wilkes, admiral of the Navy of the United States, and others, are defendants; that the testimony of the said Theodore Olcott, of the city of Albany, county of Albany, & State of New York, and that of Aaron E. Hovey, of South Boston, Suffolk County, in the State of Massachusetts, and that of Thomas Darling, of the village of Flushing, county of Queens, in the State of New York, were material and necessary for him, the said plaintiff, in the prosecution of said suit, and that he, the said Theodore
160 Olcott, and the said Aaron E. Hovey, and the said Thomas Darling, and each of them above named, live at the places as above set forth, more than one hundred miles from the city of Raleigh, in the State of North Carolina, where the court at which the said plaintiff expected the said cause would be tried was appointed by law to be held; that all the defendants' attorneys reside in North Carolina, afore-

said, and that all the defendants, excepting Aaron E. Hovey, one of the defendants, reside in North Carolina, as he is informed and verily believes.

And the said AARON E. HOVEY, appearing at the same time and place before me, and being carefully examined and cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, maketh answer to questions proposed as follows:

Ques. 1. Where do you reside?

Ans. 1. I reside at South Boston, Suffolk County, in the State of Massachusetts.

Ques. 2. Are you one of the defendants in this suit?

Ans. 2. Yes.

Ques. 3. What kind of a property is that property?

Ans. 3. It is both a farming and mining property, and has water privileges.

Ques. 4. State, if you know its value, or about the value.

Ans. 4. At the time I was there it was worth *a* about seventy to seventy-five thousand dollars.

Ques. 5. Did you or not ever reside upon the property?

161 Ans. 5. I did.

Ques. 6. When?

Ans. 6. I resided there from 1856 to the fall of 1860.

Ques. 7. In what capacity did you reside upon the place?

Ans. 7. I resided upon the place as sub-assistant, or assistant to the general agent.

Ques. 8. By whom was the property first owned when you resided there?

Ans. 8. By the High Shoals Mining & Manufacturing Company of New York.

Ques. 9. Did you or not ever take the title to that property in yourself?

Ans. 9. I did.

Ques. 10. From whom did you take title?

Ans. 10. I got the title from the executors of the estate of Andrew Hoyle, whose names were William P. Bynum and Thomas Greer.

Ques. 11. Who was Andrew Hoyle?

Ans. 11. Andrew Hoyle was the president of the High Shoals Manufacturing Company of North Carolina.

Ques. 12. Was or was not that company in existence when you first moved down there?

Ans. 12. It was in existence before I went down there.

Ques. 13. Was the title to that property ever in that company?

Ans. 13. It was.

Ques. 14. Do you know to whom, if any one, they conveyed that property?

162 Ans. 14. To Philip W. Groot, of New York.

Ques. 15. How did you obtain title to the property?

Ans. 15. I bought under the mortgage given upon the property by Philip W. Groot to Andrew Hoyle, the president of said company.

Ques. 16. Did or did you not buy at a foreclosure sale of the mortgage upon that property?

Ans. 16. I bought at the foreclosure of the mortgage at a public sale.

Ques. 17. Do you or do you not recollect who officiated as auctioneer on said sale?

Ans. 17, I do not recollect distinctly.

Ques. 18. At what price did you bid off the property?

Ans. 18. At $48,500.

Ques. 19. Do you recollect what, if any other bids, were made upon the property?

Ans. 19. There was but one bid besides mine, to my knowledge.

Ques. 20. State, if you know whose that was.

Ans. 20. I think his name was Bartlett Shipp, esq.

Ques. 21. For what purpose did you attend that sale?

Ans. 21. To purchase the property for Theodore Olcott and Eben S Stephenson, and as their agent.

Ques. 22. At whose request did you bid off the property for them?

Ans. 22. At their request and by their direction.

Ques. 23. Had you or not any discretion as to the amount which you were to bid for the property?

Ans. 23. I had none.

163 Ques. 24. Who directed the amount which you did bid?

Ans. 24. Theodore Olcott.

Ques. 25. When?

Ans. 25. Some few minutes before the property was knocked down.

Ques. 26. Had you or not any interest in the property so knocked down to you?

Ans. 26. I had no interest.

Ques. 27. Did you or not pay any money on this purchase?

Ans. 27. I did not.

Ques. 28. Was there or not any money paid upon the purchase, and, if yea, by whom and what amount?

Ans. 28. There was money paid upon the purchase; it was furnished by Messrs. Olcott and Stephenson, and about eight thousand dollars.

Ques. 29. Did you or not see any money paid?

Ans. 29. I did.

Ques. 30. Do you know how the balance of the purchase-money was paid or secured, and, if yea, state how.

Ans. 30. Yes; by a mortgage given back by me to the executors of Mr. Hoyle.

Ques. 31. How long after you took title did you hold the title in your own name?

Ans. 31. Six or eight days only.

Ques. 32. How long before you purchased the property did you know you were to be the purchaser?

Ans. 32. Only a few minutes.

164 Ques. 33. What did you do with the property?

Ans. 33. I conveyed it to Messrs. Olcott and Stephenson, in pursuance of an arrangement with them.

Ques. 34. What was that arrangement?

Ans. 34. That I should bid it off and convey it to them.

Ques. 35. When, or about when, did you convey this property to Messrs. Olcott & Stephenson?

Ans. 35. It was on the 8th day of January, 1859.

Ques. 36. How did you convey to them?

Ans. 36. By deed.

Ques. 37. Do you recollect or not whether that deed had subscribing witnesses to it? if yea, state who they were.

Ans. 37. Yes; there were two, Thomas Darling and Augustus Schonborg.

Ques. 38. After executing that deed, what did you do with it?

Ans. 38. I gave it to Mr. Olcott.

Ques. 39. Do you or do you not know where that deed now is?

Ans. 39. I do not.

Ques. 40. Did you or did you not ever have that deed in your possession after the execution and delivery?

Ans. 40. I have never had it in my possession, nor have I seen it since.

Ques. 41. Did either Mr. Olcott or Mr. Stephenson pay you any money upon the execution and delivery of said deed?

Ans. 41. They did not.

165 Ques. 42. Were you or were you not pecuniarily able to purchase that property?

Ans. 42. No.

Ques. 43. State whether or not, in your opinion, your pecuniary circumstances were generally known at High Shoals by parties there.

Ans. 43. Yes; I presume they were.

Ques. 44. Upon what do you base your opinion?

Ans. 44. From my position as sub-agent and my manner of living.

Ques. 45. Do you or not know whether Thomas Darling was aware that you purchased the property for Messrs. Olcott & Stephenson?

Ans. 45. I have no doubt that it was well known, notorious, that I purchased the property as agent for Olcott & Stephenson; Darling knew the fact.

Ques. 46. Did you ever, or not, at any time claim or pretend to be the owner of the property in question?

Ans. 46. I never pretended or claimed to be the owner of the property in my own right, nor did I ever exercise any acts of ownership over the same.

Ques. 47. Did Bynum or Grier ever demand payment of you of the purchase-money for the premises?

Ans. 47. Never, in any way.

Ques. 48. Do you or not know of a second mortgage having been executed on that property?

166 Ans. 48. I executed a second mortgage on the premises, bearing date January 3rd, 1859.

Ques. 49. Was any additional security besides that mortgage given, to your knowledge?

Ans. 49. There was a bond given by me as collateral to the second mortgage.

Ques. 50. Do you know by whom that bond was executed? if yea, state by whom.

Ans. 50. It was executed by myself, and by Mr. Olcott & Mr. Stephenson.

Ques. 51. Do you know at whose request Messrs. Olcott & Stephenson executed that bond with you?

Ans. 51. By request of Mr. Bynum.

Ques. 52. When you purchased at this foreclosure sale, was or was not the bond of Philip W. Groot surrendered to you?

Ans. 52. It was not.

Ques. 53. Were you or not at any subsequent sale of this property?

Ans. 53. Not to my knowledge.

Ques. 54. Do you or not, of your own knowledge, know of the sale of the property in question to William Sloan?

Ans. 54. I do not.

Ques. 55. Do you or not, recollect of se'ing any advertisement posted up of this property?

Ans. 55. I have no recollection of seeing any.

Ques. 56. Were you or not ever informed that the High Shoals Manufacturing Company had resolved to sell this property to William Sloan?

167 Ans. 56. I never had any information of the kind.

Ques. 57. Did you ever, or not, assent to any sale of this property to William Sloan?

Ans. 57. No.

Ques. 58. Had you, or not, any authority, as agent, to assent to any such sale of the property in question?

Ans. 58. No.

Ques. 59. Did you, or not, ever claim any authority over the disposition of this property?

Ans. 59. No.

Ques. 60. Do you recollect, or not, when the property in question had been sold to William Sloan?

Ans. 60. I never knew of it until the 17th September, 1868.

Ques. 61. Did you, or not, ever execute a paper purporting to surrender the possession of this property to any one?

Ans. 61. I did.

Ques. 62. By whose request?

Ans. 62. William P. Bynum.

Ques. 63. Can you now state the contents of that paper?

Ans. 63. I cannot.

Ques. 64. Do you recollect who was present when you executed that paper?

Ans. 64. No one but W. P. Bynum & myself.

Ques. 65. Did you read, or were you informed, of the contents of the paper previous to its execution by you?

Ans. 65. I don't recollect.

Ques. 66. Why did you sign that paper?

168 Ans. 66. Because Mr. Bynum informed me that it was necessary, in order to transfer the property back to him, as the time had gone by when the money should have been paid on the mortgage.

Ques. 67. Do you recollect what, if anything, you said to Bynum at the time he presented the paper to you for your signature & execution?

Ans. 67. I said, "I suppose it is all right;" he said it was, and I signed it.

Ques. 68. Did you or not of your own knowledge, know anything of the nature & effect of that paper?

Ans. 68. I did not, except as he informed me.

Ques. 69. When was this paper signed, according to your recollection?

Ans. 69. It was May, 1860, I believe.

Ques. 70. Had you or not any authority, verbal or written, from Messrs. Olcott and Stephenson, or either of them, to execute such a paper, or to make any disposition of any rights which they, or either of them, then had in the premises in question?

Ans. 70. None, whatever.

Ques. 71. What was the nature of your possession of the premises at that time?

Ans. 71. I was a tenant at sufferance, because I could not get away.

Ques. 72. Do you or not know whether William P. Bynum knew the nature of your possession of those premises?

169 Ans. 72. I have no doubt, not the slightest, that he knew.

Ques. 73. Do you or not know whether at the time you exe-

cuted the "surrended," so-called, that Bynum knew you had no interest in the property?

Ans. 73. I have no doubt whatever that he did know.

Ques. 74. Do you recollect of seeing William Sloan on that property while you were there?

Ans. 74. I saw him there but very seldom, passing and repassing in his professional duties.

Ques. 75. What was his occupation or profession?

Ans. 75. A practicing physician.

Ques. 76. Was he reputed to be a man of large wealth or not?

Ans, 76. He was a man, not of large wealth, but of easy circumstances.

Ques. 77. Did you or not ever hear William Sloan assume or claim to be the owner or proprietor of the property in question?

Ans. 77. No, not after the purchase by me.

Ques. 78. Did or did not William Sloan ever give you any directions respecting this property?

Ans. 78. None, whatever.

Ques. 79. Did or did not the High Shoals Manufacturing Company work this property after you went there?

Ans. 79. No.

Ques. 80. Did you or not ever pay any taxes on this property after the purchase by you?

Ans. 80. No.

Ques. 81. Did you ever or not, *ever* contract any debts, based
170 upon any assumed ownership of this property by you?

Ans. 81. No.

Ques. 82. At the time of the execution of the "deed of surrender," so-called, was Thomas Darling present or not?

Ans. 82. He was not present.

Ques. 83. Were you or not ever requested by William Sloan to surrender the possession of this property?

Ans. 83. Never.

Ques. 84. Were you or not familiar with the business of the High Shoals Mining and Manufacturing Company?

Ans. 84. I was.

Ques. 85. Was or was not their business a profitable business?

Ans. 85. Decidedly unprofitable.

Ques. 86. While you were upon the premises in question, did this company manufacture any iron?

Ans. 86. No; none at all.

Ques. 87. Will you state whether, to your knowledge, any timber was cut while you were there?

Ans. 87. There was timber cut there to some considerable extent.

Ques. 88. To what uses was the timber so cut applied?

Ans. 88. Various purposes benefiting or tending to the improvement of the property.

Ques. 89. State how.

171 Ans. 89. For building fences, houses, barn, a large and very valuable water-wheel, water-courses, repairing the dam, bridges, &c.

Ques. 90. Was or was not any of the land clear or cultivated?

Ans. 90. A portion of it was cleared and cultivated.

Ques. 91. In your judgment, did or not the improvement put upon the property, more than compensate for the value of the timber cut?

Ans. 91. There is no doubt of it.

Ques. 92. State, generally, whether or not all the timber cut was used in the improvements put upon the premises?

Ans. 92. It was.

Ques. 93. Did you personally make any agreement with Bynum & Grier in relation to the purchase of the High Shoals property?

Ans. 93. No.

Ques. 94. By whom was that agreement made?

Ans. 94. It was all made by Messrs. Olcott & Stephenson.

Ques. 95. From all the circumstances connected with the purchase of the property in question by you, and which were known to Bynum, do you think it possible that Bynum or Grier can have believed or supposed that you were the real owner of the property in question, or that you took the title for any other persons than for Messrs. Olcott & Stephenson?

Ans. 95. I do not think it possible—the fact was too notorious.

Ques. 96. Can you or not state positively that Darling was
172 not present when you executed the paper purporting to be the surrender of the property?

Ans. 96. He was not there.

Ques. 97. Did or did not Bynum, or any other person, surrender up to you the bond which you gave to accompany the mortgage?

Ans. 97. No.

Ques. 98. Did or did not Bynum or Grier ever demand payment of that bond from you?

Ans. 98. No.

Ques. 99. Did you ever or not have any transactions with Grier, the co-executor with Bynum?

Ans. 99. No; I did not know him.

Q. 100. Do you or not know Exhibit "A" to be a true copy of the bond given yourself, Olcott, & Stephenson as collateral to the mortgage before referred to by you?

A. 100. Yes; I believe it is; the endorsement upon it is in my own handwriting.

Q. 101. What is the original of that bond, if you know?

A. 101. I don't know.

Q. 102. Have you or not seen it since you left it with Bynum?

A. 102. No; I have not.

Q. 103. Do you or not know whether the complainant in this case, Theodore Olcott, was at this High Shoals property in 1860?

173 A. 103. I have no recollection of seeing him there in 1860, and do not believe he was there at that time.

Q. 104. Do you or not know where the plaintiff was in 1860?

A. 104. I believe he was in New York State, & know that I did not see him in North Carolina during that year.

Q. 105. About when did you leave the High Shoals property?

A. 105. November, 1860, I think.

Q. 106. Do you know for whom Thomas Darling was the agent, after the purchase by you?

Ans. 106. He was the agent of Olcott & Stephenson.

Q. 107. Did you or not ever acknowledge the validity of the alleged sale to Sloan?

Ans. 107. No.

A. E. HOVEY.

And the said THOMAS DARLING, of Flushing, Queen's County, in the State of New York, appearing on the 22d day of May, 1869, before me,

and being carefully examined & cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, maketh answer to the questions proposed as follows:

Ques. 1. Where do you reside?

Ans. 1. At Flushing, Queens County, New York.

Ques. 2. Did you ever reside in North Carolina; and, if so, where and when?

174 Ans. 2. I resided in North Carolina, at High Shoals, Gaston County; I went there in the spring of 1854, & continued there till about July, 1861.

Ques. 3. In what capacity did you reside upon the High Shoals property?

Ans. 3. First as assistant to the agent of the High Shoals Mining and Manufacturing Company, then acting superintendent, and then as agent for the company.

Ques. 4. How long did you continue to act as agent for the High Shoals Mining and Manufacturing Company?

Ans. 4. I continued to act as the agent of that company down to the time of the sale to Aaron E. Hovey, which was Dec. 28, 1858.

Ques. 5. From and after the sale to Hovey for whom, if for anybody, did you act as agent?

Ans. 5. For Messrs. Olcott and Stephenson.

Ques. 6. Were you or not personally present at the sale to Hovey?

Ans. 6. I was personally present.

Ques. 7. Who else was present at that sale?

Ans. 7. Messrs. Olcott and Stephenson, various members or stockholders of the old company, W'm P. Bynum, and others.

Ques. 8. Do you recollect what bids were made upon the sale of that property?

Ans. 8. Several bids were made by members of the old company, and by Aaron E. Hovey.

175 Ques. 9. By whom was the property purchased at that sale?

Ans. 9. By Aaron E. Hovey.

Ques. 10. Do you recollect the amount bid by him, and at which it was struck down?

Ans. 10. I think at about $48,500.

Ques. 11. State whether you have any knowledge as to the fact of the property being purchased by Hovey, and why he purchased it?

Ans. 11. I know that it was purchased by Hovey by an agreement made between Messrs. Olcott and Stephenson and William P. Bynum.

Ques. 12. Were you or not personally present when Messrs. Olcott & Stephenson & Bynum made this agreement?

Ans. 12. I was.

Ques. 13. Who else, if any one, was present when this agreement was made?

Ans. 13. No one else.

Ques. 14. State where the agreement was made?

Ans. 14. At Mr. Johnston's house, not far from the residence of Bartlett Shipp; about fifteen miles from High Shoals.

Ques. 15. Was this agreement made before or after the sale to Hovey?

Ans. 15. Before.

Ques. 16. How long before?

Ans. 16. A few days.

Ques. 17. Will you state what that agreement was?

176 Ans. 17. The agreement was that it should be purchased for the principal and interest unpaid upon the bond and mortgage;

that it should be purchased by a third person, to be provided by Messrs. Olcott & Stephenson, and should be for the benefit of Messrs. Olcott & Stephenson, and the amount of the bid and the terms of purchase were agreed upon.

Ques. 18. Did you, at that time, know who that third person was?

Ans. 18. I did not.

Ques. 19. When did you know whom they had selected to bid off the property?

Ans. 19. Previously to the sale.

Ques. 20. Was there or not any money paid on the sale to Hovey?

Ans. 20. There was.

Ques. 21. Can you state about the amount?

Ans. 21. About $8,000.

Ques. 22. Can you state how the balance of Hovey's bid was to be paid or secured?

Ans. 22. By bond and mortgage for $40,000.

Ques. 23. Do you or not know whether all the $8,000 was cash?

Ans. 23. Part was cash, in amount, $6,822 50; cash dividends due Stephensons, 1,701 83; making a total, $8,524 33. This included Bynum's costs, $600 00, paid him.

Ques. 24. Do you know or not of any credit being made upon the old bond and mortgage?

177 Ans. 24. There was a credit of $9,160 for the proceeds of the sale of the negroes on the place, which were embraced in the old mortgage. This was to be allowed by the agreement.

Ques. 25. Have you now stated substantially the substance of that agreement?

Ans. 25. I have.

Ques. 26. Was or was not this agreement carried out on the sale of this property?

Ans. 26. It was.

Ques. 27. Was the property struck down to Hovey pursuant to that agreement?

Ans. 27. It was.

Ques. 28. Was the sale consummated on the day when it was made?

Ans. 28. No; it was not until a day or two after.

Ques. 29. Where was it consummated, and a deed given, if at all?

Ans. 29. It was consummated at Charlotte, and a deed given.

Ques. 30. Who was present when a deed was given at Charlotte?

Ans. 30. W. P. Bynum, Aaron E. Hovey, Theodore Olcott, Eben S. Stevenson, & myself.

Ques. 31. Do you know who, if any one, paid the money when the deed was executed?

Ans. 31. I paid the money.

Ques. 32. Whose money was it that you paid?

Ans. 32. Messrs. Olcott and Stephenson's.

178 Ques. 33. By whose authority & direction did you pay that money?

Ans. 33. Messrs. Olcott & Stephenson.

Ques. 34. What, if anything further, was done by Hovey?

Ans. 34. Hovey gave a bond and mortgage, under his agreement, for the balance of the purchase-money, being $40,000.

Ques. 35. What was done with Hovey's bond and mortgage?

Ans. 35. It was given to William P. Bynum.

Ques. 36. Do you know whether Hovey paid any of his own money on this purchase; if so, state the fact?

Ans. 36. He did not pay any money of his own, to my knowledge?
Ques. 37. From whom did all the money then paid come?
Ans. 37. From Messrs. Olcott & Stephenson.
Ques. 38. Did you or not see the deed delivered by Bynum to Hovey?
Ans. 38. I did.
Ques. 39. How long did Hovey retain the title to this property?
Ans. 39. Only a few days.
Ques. 40. To whom did Hovey then convey the property?
Ans. 40. To Messrs. Olcott & Stephenson.
Ques. 41. How do you know that such was the fact?
Ans. 41. I saw the deed of conveyance.
Ques. 42. By whom was the deed executed?
179 Ans. 42. By Aaron E. Hovey.
Ques. 43. Were there or not to your knowledge, any subscribing witnesses to that deed?
Ans. 43. There were.
Ques. 44. How many?
Ans. 44. Two.
Ques. 45. Who were they?
Ans. 45. Augustus Schoburg and myself.
Ques. 46. Do you know where Schoburg now is, of your own knowledge?
Ans. 46. I do not.
Ques. 47. State whether or not any money or other valuable consideration was paid by Messrs. Olcott & Stephenson, or either of them, to Hovey, at the time he executed the deed?
Ans. 47. There was not.
Ques. 48. What became of this deed after it was executed by Hovey & witnessed by you?
Ans. 48. It was delivered to Mr. Olcott.
Ques. 49. State whether or not you ever heard Hovey, after the sale to him, claim to be the owner of that property?
Ans. 49. I did not.
Ques. 50. State whether or not Hovey exercised any acts of ownership over the property after the nominal purchase by him?
Ans. 50. He did not?
Ques. 51. State, if you know, whether Hovey was of large means, or the contrary?
Ans. 51. He was a man of small pecuniary responsibility.
180 Ques. 52. State in what capacity Mr. Hovey was employed there?
Ans. 52. He was my assistant.
Ques. 53. Was or was not Mr. Hovey employed upon a salary?
Ans. 53. He was.
Ques. 54. Do you know about the amount per annum of Mr. Hovey's salary?
Ans. 54. About $600.
Ques. 55. State whether or not, after the sale to Hovey, there was any change in the relative positions of yourself & Mr. Hovey?
Ans. 55. There was not.
Ques. 56. State whether or not the fact was notorious at the Shoals that Mr. Hovey purchased only as agent for Messrs. Olcott & Stephenson?
Ans. 56. It was.
Ques. 57. State whether, when you met to consummate the sale at

Charlotte, the purchase by Hovey was recognized by all parties present as the consummation of the agreement previously made in relation to the sale of the property?

Ans. 57. It was.

Ques. 58. State, if you recollect, any statement made by Bynum in relation to it?

Ans. 58. Bynum remarked, "I am not presumed to know anything about it. It is a matter entirely between yourselves."

Ques. 59. Were there or not any other papers executed and
181 delivered to Bynum at the time of the consummation of the Hovey purchase?

Ans. 59. There were.

Ques. 60. What were they?

Ans. 60. There was a bond and mortgage.

Ques. 61. By whom was the bond executed?

Ans. 61. By Eben S. Stephenson, Aaron E. Hovey, and Theodore Olcott.

Ques. 62. Do you know why, or at whose request, Messrs. Olcott & Stephenson united in this bond with Hovey?

Ans. 62. At the request of William P. Bynum.

Ques. 63. What was done with this bond after it was signed by Olcott, Stephenson & Hovey?

Ans. 63. It was given to William P. Bynum.

Ques. 64. Where is that bond now; do you know?

Ans. 64. I do not know.

Ques. 65. Will you look at the paper shown you, marked "Exhibit A?" State whether that paper is a true copy of the bond spoken of.

Ans. 65. I believe it to be a true copy.

Ques. 66. In whose handwriting is that exhibit?

Ans. 66. In my handwriting.

Ques. 67. Where was it made?

Ans. 67. At Charlotte, at the time.

Ques. 68. When was it made?

Ans. 68. January 3rd, 1859.

Ques. 69. Who claimed this High Shoals property as owners after the sale to Hovey?

Ans. 69. Messrs. Olcott & Stephenson.

182 Ques. 70. Whom did you recognize as the owners after the sale to Hovey?

Ans. 70. Messrs. Olcott & Stephenson.

Ques. 71. After the sale to Hovey, in whose employ were you?

Ans. 71. Messrs. Olcott & Stephenson.

Ques. 72. After the sale to Hovey, how long did you reside upon the place?

Ans. 72. About eighteen months.

Ques. 73. Did you occupy a house erected upon the premises as a dwelling?

Ans. 73. I did.

Ques. 74. Was that house furnished to you as a part of your compensation as agent?

Ans. 74. It was; by Olcott & Stephenson.

Ques. 75. Did you pay them any rent for the house at all?

Ans. 75. I did not.

Ques. 76. After the 28th April, 1860, did you continue to occupy the same house?

Ans. 76. I did.

Ques. 77. To whom, if to any one, did you pay rent after the last-mentioned date?

Ans. 77. To no one.

Ques. 78. After April, 1860, was rent ever demanded of you by any one?

Ans. 78. No.

Ques. 79. Did you know one William Sloan?

Ans. 79. I did.

Ques. 80. Did or did not William Sloan ever give you any di-
183 rections respecting the management of the High Shoals property?

Ans. 80. He did not.

Ques. 81. Did or did not W'm Sloan know that Messrs. Olcott & Stephenson were the purchasers of the property through Hovey?

Ans. 81. He did.

Ques. 82. Did you or not ever see a paper purporting to be a deed of surrender of that property, executed by Hovey to Bynum & Grier, or any other person?

Ans. 82. I did not.

Ques. 83. Were you ever present when such a deed was executed or delivered by Hovey?

Ans. 83. I was not.

Ques. 84. Did you or not ever assent to or ratify or approve of any such deed?

Ans. 84. No, I did not.

Ques. 85. Had you any authority, verbal or written, from Messrs. Olcott & Stephenson, or either of them, to assent or approve of such a paper for them or in their behalf?

Ans. 85. No.

Ques. 86. Had you or not any authority, as agent for Messrs. Olcott & Stephenson, to surrender possession or waive any rights which they possessed in that property?

Ans. 86. No.

Ques. 87. After the sale to Hovey, did you or not give any notes for the High Shoals Mining & Manufacturing Company?

184 Ans. 87. No; only in the settlement of accounts existing; none to create any new liabilities.

Ques. 88. Subsequent to the Hovey purchase, did you or not keep the accounts of Messrs. Olcott & Stephenson separate from the accounts of the High Shoals Mining & Manufacturing Company?

Ans. 88. I kept them separate.

Ques. 89. State whether or not there was more or less litigation in relation to the High Shoals Mining & Manufacturing Company while you resided there?

Ans. 89. There was.

Ques. 90. What lawyer or counsel conducted the proceedings, generally, on behalf of the High Shoals Mining & Manufacturing Company?

Ans. 90. H. W. Guion was counsel for the company; Mr. William P. Bynum was the counsel opposed to the company.

Ques. 91. After the sale to Hovey, who acted as the attorney & counsel for Messrs. Olcott & Stephenson.

Ans. 91. W'm P. Bynum.

Ques. 92. After the purchase by Messrs. Olcott & Stephenson, were there or not any improvements made upon this property?

Ans. 92. There were.

Ques. 93. Will you state whether or not these improvements were valuable?

Ans. 93. They were.

185 Ques. 94. State what they were.

Ans. 94. New overshot water-wheel, which I think was eighteen (18) feet in diameter; it was a well made, powerful wheel; a new dwelling house was built, new fences, the dam and race-way were improved and repaired, dwellings were painted, a bridge was built, bridges were repaired, & land cleared and cultivated.

Ques. 95. State whether or not any timber was cut on the premises after the Hovey purchase?

Ans. 95. There was some cut, but it was only used to repair the place and for fire-wood.

Ques. 96. In your judgment, was the place more benefitted by the improvements made by Olcott & Stephenson, than it was injured by the timber cut?

Ans. 96. Very much more benefitted.

Ques. 97. Was any iron manufactured on the premises while in the possession of Messrs. Olcott & Stephenson?

Ans. 97. No.

Ques. 98. Was there or not any iron manufactured by the High Shoals Mining and Manufacturing Company while you were there.

Ans. 98. No.

Ques. 99. Was there or not any steam-engine or other machinery, belonging to Olcott & Stephenson on the property in question?

Ans. 99. There was.

186 Ques. 100. To whom did it belong?

A. 100. Messrs. Olcott & Stephenson.

Q. 101. Can you state about the value of this machinery?

A. 101. About $2,500, or more.

Q. 102. State, if you know, what became of the machinery?

A. 102. It was taken possession of by W'm P. Bynum.

Q. 103. Do you know of any moneys, other than those mentioned as paid upon the purchase by Hovey, paid by Olcott & Stephenson to procure a perfect title, or quiet possession of the premises in question?

A. 103. I do not.

Q. 104. Do you know the name of the company by whom this property was owned in 1854?

A. 104. "High Shoals Manufacturing Company."

Q. 105. Do you know when this company ceased business?

A. 105. When they conveyed to Philip W. Groot.

Q. 106. Do you know or not whether the High Shoals Manufacturing Company did convey this property to Philip W. Groot?

A. 106. Yes, I do.

Q. 107. Do you or not know the name of the president of the High Shoals Manufacturing Company?

A. 107. I do; Andrew Hoyle.

Q. 108. Do you know what became of the franchises of the High Shoals Manufacturing Company?

187 A. 108. Yes; they were transferred to Philip W. Groot.

Q. 109. Do you know what became of the stockholders' certificates of stock in the High Shoals Manufacturing Company?

A. 109. They were surrendered up to Philip W. Groot.

Q. 110. Have you ever seen, since the sale to Groot, any of those certificates which were so surrendered?

A. 110. I have.

Q. 111. Can you produce any such certificate?
A. 111. I can.
Q. 112. Will you produce such a one?
A. 112. Yes; here it is.
(Witness produces certificate, marked Exhibit "B.")
Ques. 113. What was the name of the shareholder named in this certificate?
Ans. 113. Bartlett Shipp, 169 shares.
Q. 114. What other scrips do you know to have been surrendered & by whom?
A. 114. That by Caleb Phifer, of 63 shares; Andrew Hoyle, 225 shares; W'm E. Rose, 150 shares; E. A. Brevard, 24 shares; Aaron Jenkins, 15 shares; Thomas Little, 11 shares; John Webster, 6 shares; Daniel Hines, 4 shares; John R. Falls, 4 shares; Alexander Goodson, 3 shares; John Falls, 3 shares; L. E. Thompson, 15 shares; William Jenkins and James H. White, 2 shares; Daniel Hoffman, 9 shares; William Phifer, 25 shares, & J. Johnston, 8 shares.
Q. 115. How do you know that the several stockholders you
188 mention did surrender their scrips?
Ans. 115. I have seen the actual scrip surrendered.
Q. 116. Were their surrenders all in form similar to that of Bartlett Shipp's, produced & marked Exhibit "B."
A. 116. Yes.
Q. 117. What was the total number of shares of the old company?
A. 117. 750.
Q. 118. Of this number, how many shares do you know to have been surrendered by the stockholders?
A. 118. 736.
Q. 119. Do you or not know what became of the balance of the scrip?
A. 119. I do not; but it was agreed by the other stockholders, in writing, that the remaining 14 shares should be surrendered when demanded by Groot.
Q. 120. Do you know or not what disposition was made by Groot of this stock of the High Shoals Manufacturing Company?
A. 120. Yes; it was transferred in trust to Greene C. Bronson & Samuel Beardsley, for the High Shoals Mining & Manufacturing Company.
Q. 121. How do you know such to be the fact?
A. 121. By having seen the original transfer.
Q. 122. Was that transfer in writing?
A. 122. It was.
189 Q. 123. Can you or not state the exact language of that transfer?
Ans. 123. I can.
Q. 124. State it.
A. 124. "For value received I, Phillip W. Groot, do hereby sell, assign, & transfer to Greene C. Bronson & Samuel Beardsley, in trust for the High Shoals Mining & Manufacturing Company, a corporation under the laws of the State of New York, all the stock of the High Shoals Manufacturing Company, a corporation under the laws of the State of North Carolina, and all the rights & priveleges which property belong to the owners of the said stock.
"New York, April 8th, 1854.
(Signed & sealed.) "P. W. GROOT."

Q. 125. Do you know Phillip W. Groot's signature?

A. 125. Yes.

Q. 126. Is the signature the handwriting of Phillip W. Groot which was signed to the transfer, of which you have spoken?

A. 126. It was.

Q. 127. Where did you see these surrendered scrips, & in whose possession?

A. 127. In the hands of Theodore Olcott.

Q. 128. Do you or not know whether Hovey's title was derived through the foreclosure of a mortgage, given by this same Philip W. Groot to the High Shoals Manufacturing Company to secure a part of the purchase-money?

190 A. 128. It was.

Q. 129. Do you or not know what Groot paid for this property?

A. 129. The amount specified in the deed is $75,000.

Q. 130. Do you or not know of any monies subsequently paid by the New York Company to perfect their title or obtain quiet possession of the premises?

A. 130. I do know.

Q. 131. Can you state about the amount subsequently paid by the New York Company?

A. 131. $13,300. Of this sum $12,000 was paid to extinguish an outstanding lease, and the balance, $1,300, was paid for ore claimed by a previous lessee, which ore had been mined by said lessee, and claimed by him of the New York Company after the purchase by them.

Q. 132. Do you know or not whether the complainant, Theodore Olcott, was on the High Shoals property in 1860?

A. 132. I think he was not.

Q. 133. Did you or did you not, to your recollection, see him there in 1860?

A. 133. No.; not to my recollection.

Q. 134. Had you authority or not to assent, in behalf of Messrs. Olcott & Stephenson to any sale or other disposition of this High Shoals property?

A. 134. I had not.

191 Q. 135. Do you not recollect of paying to William B. Bynum, on behalf of Messrs. Olcott & Stephenson, any moneys as a retaining fee to him as their counsel?

Ans. 135. I do.

Q. 136. How much?

A. 136. $50 00.

Q. 137. When was this money paid to Bynum as a counsel fee.

A. 137. It was paid immediately after the consummation of the Hovey purchase.

THOMAS DARLING.

And the said THEODORE OLCOTT, of the city & county of Albany & State of New York, appearing on the 27th day of May, 1869, before me, and being carefully examined & cautioned, and duly sworn to testify the truth, the whole truth, & nothing but the truth, maketh answer to the questions proposed as follows:

Q. 1. Where do you now reside?

A. 1. In the city of Albany, in the State of New York.

Q. 2. Are you the complainant in the suit above entitled?

A. 2. I am.

Q. 3. Do you know or not the property known as the High Shoals property, in the State of North Carolina?

A. 3. I do.

192 Q. 4. State when & where you first became acquainted with that property?

A. 4. In North Carolina, in the fall of 1854.

Q. 5. State generally the nature of that property?

A. 5. It was a large mineral & agricultural property, containing between fourteen and fifteen thousand acres. On it was a large water power & facilities for manufacturing & building, and improvements of various kinds.

Q. 6. Where was the property located?

A. 6. In the counties of Gaston, Lincoln, & Cleveland, in North Carolina.

Q. 7. State, in your opinion, the value of that property in 1854?

A. 7. From seventy-five to one hundred thousand dollars.

Q. 8. State in whose possession was that property when you first became acquainted with it?

Ans. 8. It was, previously to 1854, in possession of The High Shoals Manufacturing Company of North Carolina.

Q. 9. Do you know what disposition was made, if any, by the North Carolina Company? If yea, state.

A. 9. It was sold by them to Philip W. Groot.

Q. 10. State what, if anything, you know of this purchase by Groot?

A. 10. It was made for the High Shoals Mining & Manufacturing Company of the city of New York, the last-named company fur-

193 nishing to Groot the means for purchasing the property in question.

Q. 11. State if you know the consideration agreed to be paid for the property by Groot?

A. 11. Seventy or seventy-five thousand dollars.

Q. 12. State, if you know, what disposition was made by Groot of this property?

A. 12. It was conveyed by him to Greene C. Bronson & Samuel Beardsley, in trust for the High Shoals Mining & Manufacturing Company.

Q. 13. Do you know when, or about when, the agreement was made between Groot & the old company for the purchase of this property?

A. 13. I think it was sometime in January, 1854.

Q. 14. After the sale to Groot did or did not the old company continue to transact business?

A. 14. They did not.

Q. 15. State, if you know, what became of the certificates of stock held by the several shareholders in the said High Shoals Manufacturing Company?

A. 15. They were transferred & delivered up to Philip W. Groot.

Q. 16. State how you know such to be the fact?

A. 16. I have the certificate now in my possession, with the exception of fourteen shares in the name of William Slade, which I am

194 unable to find, & also Bartlett Shipps', which is attached to the deposition of Thomas Darling, taken in this same case, & which was delivered by me to him.

Q. 17. Will you produce one of those transfers?

A. 17. I will.

(Witness produces the exhibit marked "C.")

Q. 18. Whose certificate is the one produced?

A. 18. Caleb Phifer's.

Q. 19. State what other certificates you have in your possession so surrendered?

A. 19. Andrew Hoyle, 225 shares; William E. Rose, 150 shares; E. A. Brevard, 24 shares; Aaron Jenkins, 15 shares; Thomas Little, 11 shares; John Webster, 6 shares; Daniel Hines, 4 shares; John R. Falls, 4 shares; Alexander Goodson, 3 shares; John Falls, 3 shares; L. E. Thompson, 15 shares; W'm Jenkins & Ja's H. White, 2 shares; Daniel Hoffman, 9 shares; William Phifer, 25 shares; J. Johnston, 8 shares.

Q. 20. State in what form are the certificates which remain in your possession, and what is the form of their transfers?

A. 20. Substantially that of the one produced, and marked Exhibit "C."

195 Q. 21. State by whom possession was taken of this property after the transfer to Groot?

A. 21. The High Shoals Mining & Manufacturing Company of New York.

Q. 22. State whether you have any knowledge of any more money being paid by the last-mentioned company on account of the property in question?

A. 22. I have.

Q. 23. State the amount.

A. 23. About $13,300.

Q. 24 State whether or not this property was conveyed to the New York company, subject to any incumbrance? if yea, state what.

A. 24. It was, subject to a mortgage of fifty thousand dollars on account of the purchase-money given by Philip W. Groot.

Q. 25. Were you or not largely interested in the stock of the High Shoal Mining and Manufacturing Company?

A. 25. I was.

Q. 26. State, if you recollect, the amount of your interest?

A. 26. At one time over one hundred thousand dollars, and now over ninety thousand dollars.

Q. 27. Did you know Eben S. Stephenson?

A. 27. I did.

Q. 28. Do you know whether he was interested in the stock of

196 the company last mentioned, and if yea, to what amount?

A. 28. Yes; to a very large amount. The exact amount I cannot state.

Q. 29. Do you know whether or not the New York company paid the incumbrance given on the property by Groot?

A. 29. They did not.

Q. 30. State, if you know, what was done with the mortgage executed by Groot?

A. 30. It was foreclosed.

Q. 31. For what; principal & interest?

A. 31. Yes, for principal & interest.

Q. 32. State whether or not you were present at the sale?

A. 32. I was.

Q. 33. State, if you know, to whom the property was struck off at the foreclosure sale?

A. 33. To Aaron E. Hovey.

Q. 34. State, if you know, why it was struck off to Aaron E. Hovey?

A. 34. By virtue of an agreement made between Stephenson, myself, & William P. Bynum, one of the executors of the mortgagees?

Q. 35. State when that agreement was made?

A. 35. The 25th December, 1858.

Q. 36. State what the agreement was, and where you made it?

A. 36. Mr. Stephenson & myself had a large interest in the
197 property which we wished to protect, & we accordingly agreed with Bynum that we should become the purhasers of the property upon the following terms: That the Groot mortgage would be reduced by crediting upon it the proceeds of the sale of certain negroes, which formed a portion of the property covered by the Groot mortgage, this amounting to $9,160. Forty thousand dollars was to be secured by bond and mortgage, payable in twelve, eighteen, & twenty-four months from the date of the said mortgage, and the balance was to be paid in cash.

Q. 37. State who was present when this agreement was made?

A. 37. Eben S. Stephenson, Thomas Darling, W'm P. Bynum, & myself.

Q. 38. State, if you recollect, how long after this the foreclosure took place?

A. 38. Three days. The 28th December, 1858.

Q. 39. State whether Stephenson & yourself bought the property in your own names or not?

A. 39. We did not.

Q. 40. In whose name was the property struck off?

A. 40. In the name of Aaron E. Hovey.

Q. 41. By what authority did Hovey become the purchaser?

A. 41. At the request Mr. Stephenson & myself, & for us.

198 Q. 42. Do you recollect or not whether other bids were made, other than by Hovey?

A. 42. Certainly one, but I do not recollect about the rest.

Q. 43. State, if you heard, what amount was bid on the sale by Hovey.

A. 43. Forty-eight thousand five hundred dollars.

Q. 44. State whether that bid was the result of one or more competing bids, or was it the only bid made by Hovey?

A. 44. It was the result of competing bids, by which I mean there was at least one bid more than that made by Hovey.

Q. 45. State whether or not Hovey was vested with any discretion as to the amount bid by him.

A. 45. He was not.

Q. 46. State how long before the sale Hovey knew he was to be the purchaser.

A. 46. A very short time after the interview with Mr. Bynum.

Q. 47. State, if you know, what was Hovey's position at High Shoals, & what his pecuniary condition.

A. 47. He was sub-agent under Thomas Darling, under a small salary of five or six hundred dollars, & of small pecuniary responsibility.

Q. 48. State whether his position and pecuniary condition were well known at the Shoals.

A. 48. They were.

199 Q. 49. State whether the transfer of the property was made at the time it was struck off to Hovey.

A. 49. It was not.

Q. 50. State where & when the sale was consummated.

A. 50. In Charlotte, on the 3rd day of January following.

Q. 51. State who was present when the sale was consummated.

A. 51. Eben S. Stephenson, Aaron E. Hovey, William P. Bynum, Thomas Darling, and myself.

Q. 52. State what was then and there done.

A. 52. The proceeds of the sale of the slaves was first credited upon the mortgage given by Groot, amounting to $9,160 for the balance remaining due; a mortgage was given of $40,000, and a credit was allowed to Stephenson for his interest in the Groot mortgage of $1,701\frac{83}{100}$; the balance was paid in cash, $6,822\frac{50}{100}$, making the sum of $8,524\frac{33}{100}$. This sum includes a charge made by Bynum of $600, and also an additional item of allowance made by Stephenson to Bynum, of $66 00.

Q. 53. State, if you know, who furnished the moneys which were paid at that time.

A. 53. Mr. Stephenson & myself.

Q. 54. State whether or no' Hovey furnished any portion of that money.

200 A. 54. Not any.

Q. 55. State whether or not a bond and mortgage was executed by Hovey, pursuant to the agreement you have mentioned.

A. 55. There was.

Q. 56. State what, if any other, papers were there executed by Hovey.

A. 56. A second bond & mortgage upon the same property was given by Hovey, in which bond I & Stephenson united, at the request of W'm P. Bynum.

Q. 57. What was then done with these bonds and mortgages after they were thus executed?

A. 57. They were delivered to W'm P. Bynum.

Q. 58. State where & when, if you know, the deed of the property was executed & delivered to Hovey.

A. 58. Then & there by W'm P. Bynum.

Q. 59. State whether Hovey had any interest in the property in question other than that which you have detailed.

A. 59. He had not.

Q. 60. State how long after the conveyance by Bynum & Grier to Hovey it was that Hovey retained title to the premises in question.

A. 60. A very few days.

Q. 61. State, if you know, what disposition was made by Hovey of the property so conveyed.

201 A. 61. He conveyed it to Eben S. Stephenson & myself by deed on the 8th day of January, 1859, at the High Shoals property.

Q. 62. Did you see the deed executed or not?

A. 62. I did.

Q. 63. State whether or not there were subscribing witnesses to the execution of that deed.

A. 63. There were.

Q. 64. How many?

A. 64. Two.

Q. 65. Name them.

A. 65. Thomas Darling & Augustus Schonburg.

Q. 66. Where is Augustus Schonburg, if you know?

A. 66. I do not know. The last I heard of him he was a soldier in the United States Army.

Q. 67. After this deed was thus executed & witnessed, what was done with it?

A. 67. It was delivered to me by Hovey.

Q. 68. Was any money paid by either you or Stephenson to Hovey at that time?

A. 68. There was not.

Q. 69. By whose direction or request was such conveyance made by Hovey to you and Stephenson?

A. 69. By the request of Mr. Stephenson & myself.

Q. 70. Where is that deed?

A. 70. I do not know. It is lost.

Q. 71. Have you made diligent search for that deed in the places where it would naturally be kept by you?

202 A. 71. I have.

Q. 72. After the delivery of the deed to you, state what you did with it.

A. 72. I placed it in a safe with other papers belonging to myself & the High Shoals Mining & Manufacturing Company.

Q. 73. Have you or not been able to find the said deed or the other papers connected with the said purchase deposited with said deed?

A. 73. I have not.

Q. 74. Have you or not carefully & thoroughly searched for the same in all places where they might possibly be deposited by you other than in that safe?

A. 74. I have.

Q. 75. Do you know what has become of the papers you put in that safe, including the deed in question?

A. 75. I do not.

Q. 76. Do you know where the safe is, in which they were put?

A. 76. I do not.

Q. 77. Have you or not endeavored to discover the safe?

A. 77. I have.

Q. 78. Were you able to learn anything in relation to it?

A. 78. I was.

Q. 79. What did you learn in relation to it?

203 A. 79. I ascertained that it had passed into the hands of a Mr. Gillender.

Q. 80. Did you not make inquiries of him to discover the lost papers?

A. 80. I did.

Q. 81. What, if any, information did you obtain from him in relation to the deed?

A. 81. That he knew nothing of the contents of the safe, nor where they were.

Q. 82. Had he or not any interest in the subject-matter of this suit?

A. 82. None whatever.

Q. 83. When did you last, to your recollection, see that deed?

A. 83. At the time I placed it in the safe.

Q. 84. Is Eben S. Stephenson now living?

A. 84. He is not.

Q. 85. When or about when did he die?

A. 85. About the 6th of May, 1868.

Q. 86. What became of his interest in the High Shoals property?

A. 86. He conveyed to me.

Q. 87. Did you or not make inquiries of Stephenson in relation to the papers contained in the safe, among which was included this deed?

A. 87. I did.

Q. 88. What, if any, information thereto did you obtain from Stephenson?

A. 88. That he knew nothing about them.

204 Q. 89. Where did you obtain the description for the deed made by Stephenson to you?

A. 89. I there described the property by reference to the conveyance made by Bynum & Grier to Aaron E. Hovey above mentioned.

Q. 90. Why did you not record at once the deed from Hovey to yourself & Stephenson?

A. 90. It was not then recorded for the reason that we intended to form a new company at the north, & proposed to transfer the property direct from Hovey to such company, when organized, without the intervention of our names.

Q. 91. After the delivery of the Hovey deed to you, did Stephenson, to your knowledge, ever see or have possession of the said deed?

A. 91. He did not.

Q. 92. Do you or not now know where this deed now is?

A. 92. I do not.

Q. 93. State what you believe to have become of the deed.

A. 93. Lost or destroyed.

Q. 94. Do you know of any person in whose possession it would be likely to be, or who has any interest in retaining it?

A. 94. I do not.

Q. 95. Can you or not state the exact contents of that deed?

205 A. 95. I can.

Q. 96. Will you so do?

A. 96. I can produce what I believe to be an exact copy; the paper marked Exhibit "D" is such.

Q. 97. By whom was that copy made?

A. 97. By myself.

Q. 98. Where & when?

A. 98. On the property, at the time of the execution of the original deed.

Q. 99. Did or did not William P. Bynum know that Aaron E. Hovey purchased the property in question for you and Stephenson?

A. 99. I have no doubt whatever but that he did know it.

Q. 100. State whether such was generally known to be the fact at the Shoals.

A. 100. Yes; it was.

Q. 101. After the sale to Hovey, who assumed the control and possession of the property?

A. 101. Mr. Stephenson and myself.

Q. 102. In whose employ was Darling after the sale to Hovey?

A. 102. Mr. Stephenson and myself.

Q. 103. State whether not to your knowledge Hovey ever claimed any ownership in the premises, or asserted any title thereto.

A. 103. Never.

Q. 104. After the conveyance by Hovey to yourself & Stephen-

206 son, how long did you remain at the Shoals?

Ans. 104. A few days—less than a week.

Q. 105. State who, if any one, was left in possession by you.

A. 105. Thomas Darling.

Q. 106. State in what capacity Darling remained there.

A. 106. As our agent, having a general charge of the property.

Q. 107. Had he any authority in writing from you and Stephenson?

A. 107. He had not.

Q. 108. Had he any authority to make or assent to any disposition of the High Shoals property?

A. 108. He had not.

Q. 109. Did or did not Aaron E. Hovey remain upon the property after you left?

A. 109. He did.

Q. 110. In what capacity?

A. 110. He was an assistant to Thomas Darling.

Q. 111. Had he any authority or power as agent to surrender the possession of this property, or make any disposition whatever of the same?

A. 111. None whatever.

Q. 112. Can you state about the day you left High Shoals, in the State of North Carolina? if yea, state.

A. 112. About the 10th of January, 1859.

Q. 113. Were or were you not at High Shoals in the year 1860,
207 or were you in the State of North Carolina during that year?

A. 113. I was not.

Q. 114. After the conveyance by Hovey to you & Stephenson, how many interviews, if any, have you ever had with W'm P. Bynum?

A. 114. But two, to my recollection.

Q. 115. Where and when was the first interview with him, subsequent to the conveyance by Hovey?

A. 115. I met him on the train going from Charlotte to Lincolnton, about the 1st April, 1861.

Q. 116. Who was with you at that time on the cars?

A. 116. Mr. John J. Muir.

Q. 117. Where were you then going?

A. 117. To the Shoals, for the purpose of examining into the mining & other resources of the property.

Q. 118. Did you at that time or not have any conversation with Bynum?

A. 118. I did.

Q. 119. What conversation did you have with him? State the substance of it.

A. 119. I informed him that Mr. Muir & myself were going upon the High Shoals property for the purpose of informing Mr. Muir as to its resources & value.

Q. 120. At that interview, was any mention made of any sale of the property having been made to William Sloan?

A. 120. None whatever.

208 Q. 121. Had you or not at that time heard of any such sale, or pretended sale, to William Sloan?

A. 121. I had not.

Q. 122. When did you first hear of such sale or pretended sale to Sloan?

A. 122. Not until I went to North Carolina, in 1868, for the purpose of commencing this suit.

Q. 123. Was or was not any demand made of you by Bynum or Grier, or by any person in their behalf, requiring payment of the moneys due upon the bond given by Hovey?

A. 123. No; there was not.

Q. 124. Was there or was there not any notice given by Bynum or Grier to you of the sale of the property in question under the Hovey mortgage?

A. 124. No.

Q. 125. Were or not any papers served upon you in any suit brought for the purpose of foreclosing the Hovey mortgage?

A. 125. None whatever.

Q. 126. Will you look at this paper produced, marked Exhibit "E," purporting to be a notice of the sale of this property? Did you ever see that notice before; &, if so, where did you first see it?

A. 126. I have seen it before—the first time within the past year.

Q. 127. State how long after the interview which you have
209 mentioned between yourself and Bynum, did the second interview take place, & where.

A. 127. About two weeks, at Newton, Catawba County, I think, North Carolina. This second & last interview was on or about the 16th day of April, 1861.

Q. 128. State why you then sought an interview with Bynum?

A. 128. Because some of the property was then in the possession of other parties, and supposing them to be in possession under some license under Bynum, as mortgagee, and wishing to make extensive explorations, & to have uninterrupted access to all parts of the property, I thought it desirable to obtain Bynum's authority so to do.

Q. 129. Did or did not Bynum give you any authority so to do?

A. 129. He did.

Q. 130. Was that authority sought for any other purpose than that mentioned?

A. 130. It was not.

Q. 131. Did you or not pay any consideration for the privilege above mentioned?

A. 131. I did not.

Q. 132. Did you or not in April, 1861, or at any other time, solicit or receive from W'm P. Bynum, as trustee, or otherwise, a lease of any part of the said High Shoals property?

A. 132. I did not.

210 Q. 133. At the last-mentioned interview with Bynum, were you or were you not informed of a sale of the property under a foreclosure of the Hovey mortgage?

A. 133. I was not.

Q. 134. Was or was not any one authorized to represent you or your interests at the foreclosure of the Hovey mortgage, and the sale thereunder to Sloan, if such sale took place?

A. 134. No one.

Q. 135. Did you ever know, or were you ever informed, of any resolution of the old company to sell the property to Sloan?

A. 135. Never.

Q. 136. How long did you and Muir remain at the High Shoals property?

A. 136. We arrived there about the first of April, 1861, and remained until about the 18th of that month.

Q. 137. How much of the explorations, which you contemplated making, had you completed before making the application to Bynum, of which you have made mention?

A. 137. We had completed all of our surface explorations, but desired to make some underground explorations which would require time, which we thought might be subsequently prosecuted by our agent, Darling, with whom we had left funds for such purpose.

211 Q. 138. Previously to this visit, in 1861, state whether you had any knowledge of Bynum's intention to enforce payment of the moneys remaining due upon the Hovey mortgage; and, if yea, state what information you had.

A. 138. In the latter part of February, or early in the spring of 1860, I heard through Darling, I think, that Bynum was about to take steps

to possess himself of the property, &, I think, I may have made application to him through Darling for further delay, and probably was informed by Darling that Bynum either had or would delay until a future day the time of payment or enforcement of the mortgage.

Q. 139. State whether you ever received any direct communication from Bynum by letter on this subject.

A. 139. Never to my recollection or belief.

Q. 140. State when you first knew that Bynum's action had resulted in the foreclosure of the Hovey mortgage & alleged sale thereunder to Sloan.

A. 140. I knew of no sale to Sloan, or heard of no such sale as is alleged to have been made to him, as I have before stated, until I went to North Carolina in 1868.

Q. 141. At either of the two interviews had between yourself and Bynum in 1861, state whether or not any mention or allusion was
212 made of any sale of the property to Sloan.

A. 141. There was not.

Q. 142. Why did you make application to Bynum as you have stated?

A. 142. At the time I found some other parties in possession, and applied to Bynum for the permission mentioned to avoid any difficulty with them; and then the embarrassments, occasioned by the war compelled my immediate return to the North, which I had difficulty in reaching; and after that time, and during the war, I could take no steps to investigate the proceedings taken by Bynum, or the nature of his action in connection with the property.

Q. 143. From anything which you there saw, or then knew, had you reason to suppose the possession of Bynum to be other than that of a mortgage?

A. 143. I had not.

Q. 144. State how lately you made offorts to organize a company for the purpose of working this property, if you made any such efforts?

A. 144. As late as the spring of 1861.

Q. 145. State what object you had in view in thus organizing a company to work this property.

A. 145. To save ourselves, if possible, out of this property, in which we had so largely invested, and with such disastrous result.

213 Q. 146. State whether, after the sale to Hovey, you acted as the agent of the High Shoals Mining & Manufacturing Company.

A. 146. I did not.

Q. 147. State whether or not, at any time after the sale to Hovey, you, as agent for the said New York company, or otherwise, acknowledged the validity of the sale to Sloan, to William P. Bynum?

A. 147. I never did.

Q. 148. Can you, from recollection, state how many times you saw Bynum after that sale?

A. 148. But twice after the consummation of the same at Charlotte, and those two interviews were those of which I have already made mention.

Q. 149. After the sale to Hovey, who, if any one, did *did* you retain as your attorney and legal adviser?

A. 149. William P. Bynum, & paid him a retaining fee as such.

Q. 150. State whether or not you communicated with any owners of the Groot mortgage the agreement which you have stated to have been made between Bynum, Stephenson, & yourself, or the substance of that agreement, previously to its consummation at Charlotte.

A. 150. I did to several of the owners.

Q. 151. What action, if any, was taken by them in relation to this communication?

214 A. 151. They referred me to Bynum, to consummate it.

Q. 152. At the time of this alleged foreclosure of the Hovey mortgage, state how much of the moneys secured by that mortgage were due—as near as you can remember.

A. 152. One installment, and the interest thereon, & that amounted to about $14,133 33.

Q. 153. State whether or not, in your judgement, based upon your knowledge of the property, a portion of that property could have been sold, and sufficient to satisfy the amount due upon the mortgage.

A. 153. It could.

Q. 154. State, generally, what improvements, if any, the nature & value of them, were put upon that property by the New York company, or by Stephenson or yourself.

A. 154. Buildings were erected; one dwelling-house was built; others were repaired; a dam & raceways were improved & and repaired; a very large & powerful water-wheel, entirely new, was put up, and a portion of the land was cleared and cultivated.

Q. 155. State whether or not, at the time of the Hovey sale, and when you left the State of North Carolina, the value of that property had been materially enhanced by the improvements which you have mentioned.

215 A. 155. I think it had.

Q. 156. State what use or disposition was made of the timber cut upon the place while you were there.

A. 156. It was employed in improving the property, and for firewood.

Q. 157. In your judgement were the improvements made of more value to the property than the cutting of the timber was an injury to it?

A. 157. Decidedly more.

Q. 158. What, in your judgement, is the value of that property now—at the present time?

A. 158. At least two hundred thousand dollars.

Q. 159. State whether you ever purchased or owned any property in the State of North Carolina other than the property in question?

A. 159. I did not.

T. OLCOTT.

And I do further certify that the preceding depositions were reduced to writing by me, and signed separately by the said Aaron E. Hovey, Thomas Darling, and Theodore Olcott, in my presence; and that I am not of counsel or attorney for either of the parties to said suit, nor am I interested in the event thereof.

Witness my hand & notarial seal, this 29th day of May, A. D. 1869.

AMASA J. PARKER, JR.,
United States Commissioner for Northern Dist. of New York, Albany, N. Y., 2nd Circuit, U. S.

216 EXHIBIT "A."

Know all men by these presents, that we, E. S. Stephenson, A. E. Hovey, & T. Olcott, are held and firmly bound unto W. P. Bynum & Thomas Grier, executors of A. Hoyl, and in trust for the late stockholders of the High Shoals Manufacturing Company, in the sum of fifteen thousand dollars, for the payment of which we bind ourselves, our

heirs & assigns, firmly by these presents, sealed with our seals this 3rd day of January, 1859.

The condition of this obligation is such that, whereas disputes have arisen and claims are made to thirteen negroes sold by said Bynum & Grier at the High Shoals, Gaston County, on the 28th December, 1858, by James W. Osborne & Emmor Graham, of Charlotte, N. C., which said negroes were sold for the benefit of the High Shoals Mining & Manufacturing Company, of which said E. S. Stephenson is the president; and whereas a suit at law is now pending in Catawba County, N. C., in the name of A. Hoyl, or his executors, the above-named Bynum and Grier against one David Froneburger & one Oats, likewise instituted for the benefit of said company; and whereas a suit is now pending in the court of equity for Gaston County, N. C., in the name of the High Shoals Mining & Manufacturing Company, against said Bynum & Grier, executors
217 of A. Hoyl and the late stockholders of the High Shoals Manufacturing Company:

Now, if the above-bounded Stephenson, Hovey, & Olcott shall well & truly indemnify & save harmless the said Bynum, Grier, & the late stockholders, as aforesaid, from all suits, recoveries, costs, & expenses which they may incur or suffer from the claims & pretenses of claims made by said Osborne & Graham to said negro's, & also indemnify & save harmless the said Bynum, Grier, & stockholders aforesaid from all costs, recoveries, expenses, & liabilities they may incur or suffer by reason of said suits pending in said counties of Gaston & Catawba in law & equity, as aforesaid, and likewise permit & suffer said W. P. Bynum or other person to dismiss so much of said bill in equity & proceedings thereon as is now pending in the court of equity for Gaston County, brought by said High Shoals Mining & Manufacturing Company against said Bynum, Grier, & the late stockholders of the High Shoals Manufacturing Company, at the proper costs & charges of said High Shoals Mining & Manufacturing Company, then this obligation to be void; otherwise to be & remain in full force & effect.

In testimony whereof the above-bounden parties have hereunto set their hands & affixed their seals the day and date above written.

218 This bond is given to secure & save harmless the parties herein named in addition to & as collateral security to a second mortgage made by A. E. Hovey to said Bynum & Grier, executed on the 3rd day of January, 1859.

"EXHIBIT B."

Certificate of stock.

169 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that Bartlett Shipp is entitled to one hundred & sixty-nine shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

169 shares.] THE 9TH DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, one hundred and sixty-nine shares of stock in the High Shoals Manufacturing Company.

B. SHIPP.

Witness: WM E. ROSE.

"EXHIBIT C."

Certificate of stock.

63 shares.] THE 7TH DAY OF DECEMBER, 1847.

219 This certifies that Caleb Phifer is entitled to sixty-three shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

63 shares.] THIS DAY OF JANUARY, 1854.

I do hereby assign & transfer to P. W. Groot, of New York, sixty-three shares of stock in the High Shoals Manufacturing Company.

CALEB PHIFER.

Witness: A. J. YORKE.

EXHIBIT "D."

This indenture, made the eight' day of January, in the year of our Lord one thousand eight hundred and fifty-nine, between Aaron E. Hovey, of the county of Gaston, and State of North Carolina, party of the first part, and Eben S. Stephenson and Theodore Olcott, of the city, county, and State of New York, parties of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of forty-eight thousand five hundred dollars, to the said party of the first part in hand paid by the said parties of the second part, the receipt whereof is hereby confessed and acknowledged, hath given,

220 granted, bargained, sold, aliened, and conveyed, and doth by these presents give, grant, bargain, sell, alien, and convey unto the said parties of the second part, in their actual possession now being, and to their heirs and assigns forever, the several tracts, pieces, and parcels of land known as the High Shoals lands, situated in Gaston, Lincoln, and Cleveland Counties, in the State of North Carolina, upon the waters of the south fork of the Catawba River, Long Creek, and other streams, containing, by estimation, fourteen thousand eight hundred and seventy-three and a half acres, be the same more or less, (for a more complete and perfect description of said lands, by metes and bounds, reference is hereto had & made to a deed of conveyance made from the High Shoals Manufacturing Company to Philip W. Groot, which said deed bears date the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and fifty-four, and is recorded and registered in the county of Gaston, in book No. 1, page 696 to 702; also recorded and registered in the county of Lincoln, in book No. 42, page 387 to 391,) and also all other lands which were conveyed or intended to be conveyed to the said party of the first part by William

P. Bynum and Thomas Grier, executors of Andrew Hoyl, de-

221 ceased, trustee of the High Shoals Manufacturing Company, a corporation created by the legislature of North Carolina, by deed bearing date the first day of January, one thousand eight hundred and fifty-nine, reference to which said deed is hereby had and made, together with all and singular the mines, minerals, ores, manufactories, furnaces, mills, buildings, machinery, and other things on or in any way appertaining to said property, and all and singular the hereditaments

and appurtenances to the said several parcels of land belonging or in anywise appertaining; and all the tools, implements, machinery, machines, and other property now on the said premises, or in any way connected with the use of the same: To have and to hold the said several pieces, parcels, and tracts of land and other property, with the hereditaments and appurtenances, to the said parties of the second part, to the sole and only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns forever; subject, nevertheless, to a mortgage on the said property, executed by the said party of the first part, on the first day of January, one thousand eight hundred and fifty-nine, to William P. Bynum and Thomas Grier, in trust for the stockholders of the High Shoals Manufacturing Company, in the State
222 of North Carolina, for securing the payment of forty thousand dollars, with interest.

And the said party of the first part, for himself, his heirs, and personal representatives, does hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, that the said party of the first part is now seized of a good, sure, and indefeasible estate in fee-simple, absolute, of and in all and singular the lands, tenements, and hereditaments above mentioned, and every part and parcel thereof, and has good right and lawful authority to grant and convey the same in manner aforesaid, and that the said parties of the second part, their heirs and assigns, shall peaceably and quietly possess, hold, and enjoy the said property and every part and parcel thereof, against all and every person and persons lawfully claiming or to claim the same, or any part thereof.

And the said party of the first part does hereby covenant and agree to and with the said parties of the second part, their heirs, executors, administrators, and assigns, that the said party of the first part will, when requested, make, execute, and deliver all such further deeds, conveyances, instruments, and assurances, except covenants of title, as may be deemed necessary or proper for the purpose of more per-
223 fectly conveying and assuring all and singular the lands and other property aforesaid to the said parties of the second part, their heirs and assigns forever.

I' witness whereof the party of the first part has hereunto affixed his hand and seal the day and year first above written.

(Signed) A. E. HOVEY. ◇

Witness:
THOMAS DARLING.
AUGUSTUS SCHONBURG.

Important land sale.

By virtue of a mortgage to the undersigned made, they will sell publicly at the High Shoals, in Gaston County, N. C., on the 28th day of April, 1860, that valuable property known as the High Shoals, embracing above 14,000 acres of land, lying on the south fork of the Catawba River, in Gaston and Lincoln Counties. This property embraces extensive and valuable gold mines, iron-ore beds, limestone, and other minerals, and also possesses the best water-power in the State.
224 A large portion of the land is valuable for agricultural purposes; and all of it susceptible of profitable cultivation.

☞ The sale will be positive, and for cash.

☞ The stockholders in the old High Shoals Company are requested

to meet in Lincolnton on the 27th of April, the day preceding the sale. Matters of the utmost importance will come before them.

THOMAS GRIER,
W. P. BYNUM,
Mortgagees.

MARCH 19th, 1860.

And further day is given to the parties.

225 And at the term of the court aforesaid, to wit: June term, 1869, the defendants file, as evidence in the cause, the depositions of the defendants W. P. Bynum and William Sloan, which said depositions are opened in open*ed* court, and are contained in the words and figures following, to wit:

226 Hon. W. A. GRAHAM:

DEAR SIR: I propose to take the depositions of W. P. Bynum and others, at the court-house in Lincolnton, N. C., before V. A. McBee, esq., S. P. Sherrill, R. H. Abenathy, or either of them, or such other person as you may designate as commissioner for that purpose, on 5th & 6th days of March, 1869, to be read in evidence on behalf of the defendants, in the case of T. Olcott v. J. L. Bridgers & others, now pending in the circuit court of the United States for the State of North Carolina, upon the following interrogatories, viz:

1. Are you acquainted with the parties to this suit?

2. Have you any, and if any, what knowledge of the matters in controversy between the parties?

In answer to this question you will please give a detailed account of your connection therewith, and of the transactions between you
227 and the plaintiff in relation thereto, up to and including the sale of the property in suit to A. E. Hovey, on the 28th December, 1858.

3d. Did you have any conversation or correspondence with the plaintiff after said sale of 28th Dec'r, 1858? If so, state when, where, and what it was, in relation to this property.

4th. State, (if you had any,) what knowledge or information you had at any time of the alleged sale & conveyance of the property in suit, on the 8th of January, 1859, from A. E. Hovey to the plaintiff, E. S. Stephenson.

5th. State who were present & fully cognizant of all that took place at the sale of 28th Dec'r, 1858, to A. E. Hovey, and who were present at the execution and delivery of the deed & mortgages made on the 1st and 2nd January, 1859.

6th. State whether the plaintiff, T. Olcott, or E. S. Stephenson had any, & if any, what previous knowledge and notice of the sale of 28th April, 1860, when the property was bid off by Dr. W'm Sloan, & their action in relation to such knowledge of the time of said sale.

7th. If you have any knowledge of other matters relating and pertinent to the controversy in this suit, and not embraced in the foregoing questions, you will please state it.

B. F. MOORE, *Att'y for Def't.*

'69, FEB'Y 12*th*.—Service accepted.

W. A. GRAHAM.

228 STATE OF NORTH CAROLINA, *Lincoln County:*

By virtue of the annexed commission to me directed, I proceeded,

this day, the 17th day of April, 1869, to cause the witnesses hereinafter named to appear before me at the court-house, in Lincolnton, Lincoln County, and State aforesaid, and their evidence to be taken in writing, to be read in evidence in a suit pending in the circuit court of the United States for the district of North Carolina, wherein Theodore Olcott is plaintiff & J. L. Bridgers & others are defendants.

W. P. BYNUM, being first duly sworn, deposes & says as follows to the several interrogatories hereto annexed, viz:

I. To interrogrtory I. "I am acquainted with all the parties to this suit."

II. To interrogatory II. I have a knowledge of the matters in controversy, which is derived from my dealings with the plaintiff & conversations with him, & my personal connexion with the matters in question and knowledge is as follows: In December, 1856, Andrew
229 Hoyl, being then president of the High Shoals Manufacturing Company, died, leaving a last will & testament, & me & Thomas Grier, the executors thereof, who duly qualified as such, & undertook the burdens of said trust, at the January sessions, 1857, of Gaston County court. The said Andrew Hoyl was the owner of two-fifths of the capital stock of said company, & had, as president thereof, by the order & direction of said company, on the 24th February, 1854, bargained, sold, & conveyed the property of the company, now in suit, to one Philip W. Groot, of the city of New York, for the sum of $75,000, of which the sum of $25,000 was paid at the time of the sale, and the balance of $50,000 and interest was secured by a mortgage on the property sold; the said P. W. Groot giving his penal bond in the sum of $100,000, conditioned to pay the said $50,000 in the following instalments, viz: $25,000 & interest on 1st March, 1855, and $25,000 & interest on the 1st September, 1855. Soon after said purchase, to wit, on the 8th April, 1854, the said P. W. Groot, being a man of no means of his own, assigned his interest in said property to the "High
230 Shoals Mining & Manufacturing Company," a company organized in the city of New York, of which E. S. Stephenson, of said city, claimed to be the president, & the plaintiff, Theodore Olcott, the business agent. The said company took immediate possession of the property, & its affairs were managed by Theodore Olcott, the agent, who resided upon the premises, at the High Shoals. By the terms of the mortgage, Andrew Hoyl, his executors or administrators, were authorized & directed, upon failure to pay the instalments as they fell due, to enter, sell, & make title to the purchaser. P. W. Groot & his assigns had failed to meet the payments as they fell due, & such was the state of things when, by the death of Andrew Hoyl, the trusts of said mortgage devolved upon me & my co-executor, Thomas Grier. The said P. W. Groot and his assigns still failing to pay the debt as stipulated in said penal bond & secured by said mortgage, or any part thereof, I entered upon the property & advertized the sale thereof, to take place on the 28th December, 1858. On the day of the sale, Stephenson,
231 Olcott, & Hovey, and the stockholders of the High Shoals Manufacturing Company met at the place of sale, and it was there & then agreed by all that the mortgage debt should be reduced to $40,000 by the sale of thirteen negro slaves, a part of said mortgaged property, & the application of the proceeds of said debt, & what that sale lacked of reducing said debt to $40,000, should be supplied by cash payment. It was further agreed that a new bond should be given & a new mortgage executed to secure said sum of $40,000. The negroes

were thereupon exposed to sale, both parties bidding therefor, & brought the sum of $9,160 00, which was applied to the mortgage debt. The further sum of $7,858 33 was required to reduce the said debt to the sum of $40,000, which sum was paid as follows, viz: $6,157 00 in cash, & a deduction of the two sums of $916 00, and $785 00, which two latter sums were the dividends due to E. S. Stephenson on the sale of the negroes, & on the balance paid of $7,858 33, the said Stephenson being a stockholder in both companies, & owning one-tenth of the stock of the selling company, to wit, the High Shoals Manufacturing Company.

232 The balance of the mortgage property was then put to sale, & bid off by A. E. Hovey; a deed to the same was executed to A. E. Hovey, on the 1st January, 1859, and a mortgage taken & penal bond executed by said Hovey, in the sum of $80,000, conditioned for the payment of $40,000 in three equal payments respectively on the 1st January, 1860; 1st July, 1860, and 1st January, 1861. The penal bond of P. W. Groot for $100,000 was then cancelled, & delivered by me to A. E. Hovey. This took place on the 1st January, 1859, in the city of Charlotte, E. S. Stephenson, Theodore Olcott, & A. E. Hovey being present together, & fully cognizant of the entire transaction, & freely assenting thereto.

III. To interrogatory III. After the sale of 28th December, 1858, I saw no change in the management of the High Shoals property. A. E. Hovey & family resided upon the premises, as before the sale. Theodore Olcott, the plaintiff, acted as an agent of the company, & also one Thomas Darling, who resided upon the premises, & was the business agent and active manager. When the first payment fell due on

233 the sale of 28th December, 1858, I insisted on payment. Theodore Olcott, the agent of the New York company, begged for further indulgence, representing to me that a short indulgence would enable them to effect a sale in New York, & pay the debt. I accordingly deferred an entry and sale, from time to time until March, 1860, when I advertized the property for sale, of which the plaintiff had timely notice. Before the day of sale, I received a letter from Mr. Olcott, the agent, requesting a postponement of the sale until the 1st of May, 1860, or as near that time as I could. I accordingly postponed the sale to the 28th April, in compliance with his request, having business elsewhere on the 1st May. Mr. Olcott was informed of this postponement, both by letter from myself & from Thomas Darling, the agent upon the premises, & I was informed by said Darling that the arrangement was satisfactory to all the parties. On the said 28th April, the property was duly exposed to public sale by me & Thomas Grier, as mortgagees, when & where, (on the premises at the High Shoals,) William Sloan, as the agent of the High Shoals Manufacturing Company, being the

234 creditors, became the highest bidder & purchaser, at the sum of $43,200, the estimated debt & interest due on the mortgage. At the time of the said sale, the creditor company were anxious to realize that debt without purchasing in the property, as most of the stock, by death of the owners, had gone into the hands of their representitives. I & others accordingly made every reasonable effort, both before & at the sale, to induce the mortgagees to pay, or third parties to buy the property; and in fact, I did induce several capitalists from Charlotte to attend the sale, with the view of buying. But on surveying the property, they concluded to run the same to $35,000 & no more, asserting that there was no money in it at a higher price. At the time of said sale, & during the entire bidding, both A. E. Hovey, the morgagor, & Thomas

Darling, the agent of the New York company, were personally present & assenting thereto, well knowing that William Sloan was bidding in behalf of the creditors, the old High Shoals Company. I expressly deny that said William Sloan was the agent of the mortgagees, or em-
235 ployed by them to bid off the property, but know that he was directed by the High Shoals Manufacturing Company to bid for them to the amount of their debt, & no more. I was, before said sale, informed, both by Hovey & Darling, that the purchasers had failed, & were unable to meet the payments, and they acknowledged the necessity of the sale & acquiesced in it, as representing the New York company. Upon the bidding off said property by the High Shoals Co., & in consideration thereof, the said Hovey & Darling, the mortgagor & agent, then and there acknowledged the validity thereof, and in further compliance with it, shortly thereafter Hovey executed & delivered the deed of abandonment & attornment referred to & set forth in the plaintiff's bill of complaint. After said sale, the same day, or shortly thereafter, the penal bond of Hovey for $80,000 was credeted with amount of said bid by W'm Sloan, and the bond itself was cancelled in satisfaction of said debt; but, whether it was delivered up to said Hovey, or destroyed, I am not now able to tell. I have made diligent search for it among
236 my papers, without being able to find it. The deed of attornment given by Hovey was made & delivered in the presence & with the full knowledge & assent of Darling, the agent, & was given freely, without any inducement, in good faith, for the purpose of consummating the transaction, & as a complete bar to all claim, at law or in equity, to the property by the New York company. From & after said sale, neither Hovey, Darling, or Theodore Olcott, or E. S. Stephenson, set up or made any claim to said property, at law or in equity, but always recognized & acknowledged the right & title of the High Shoals Manufacturing Company as being full & complete under said purchase. Immediately after said sale, Darling, the agent, began & continued to sell off the loose property, as wagons, stock, household furniture, &c., until all was disposed of; that he paid off debts of his company, made mortgages, gave notes in the name of the company for balances due, & discharged all the duties of his agency required to close up their connection with the property; that, during all this time, extending over several
237 months, the said Darling was in constant correspondence with both Stephenson & Olcott. That sometimes he would tell me the contents of their letters to him & often he would allow me to read or read to me their letters, all of which admitted that the title, both legal & equitable, was in the High Shoals Co., under said sale. That Hovey remained some months after the sale upon the property, but claiming & exercising no right adverse to the said company, but on the contrary fully recognizing that right. Whether Olcott or Stephenson, one or both, were present at the sale of 28th April, I do not remember, but I know that Mr. Olcott came to North Carolina & visited this property in the year 1860, & after said sale, and in repeated conversations with me, and with a full knowledge of said sale & all the circumstances connected with it, acknowledged the validity of the sale & the full & complete title of the purchasers at said sale. In the summer of 1860, he, on two occasions, visited me with the view of procuring a lease on a portion of said property, for gold-mining purposes, and the further view of
238 purchasing the entire property, if his mining project proved successful, and that in fact he did procure from me a mining lease, on a part of said property, which was in writing & for the period of three or six months from that time, & I am informed that he did make

explorations, &c., on said property, but finally abandoned his lease & left the State in April, 1861, or thereabouts. In March, 1862 by the direction of the High Shoals Manufacturing Company, I contracted to sell said property to R. R. & J. L. Bridgers for the sum of $65,000; that $30,000 of said sum was to be paid in North Carolina bank bills, or bills on the banks of North Carolina, & said sum was accordingly paid in miscellaneous bills of the various banks of the State, then considerably depreciated. That the balance, being $35,000, was to be paid in specie or equivalent, in three & four years, with interest. That the interest for two years has been paid on said debt & the balance is still due & unpaid. When the Messrs. Bridgers bought in March, 1862, they immediately took possession, & worked the property until
239 their sale to Admiral Wilkes, in 1865, when the said Wilkes entered into possession & has ever since occupied the same, operating the machinery & working the lands. I would further state under this general interrogatory, that P. W. Groot purchased in February, 1854, & he & those claiming under & subsequent to him, held possession of said property from that time till May, 1860, a period of over six years. That said property was valuable & used mainly for its water-power, timber, ores, &c., in operating the rolling-mills, furnaces, forges, & other machinery erected thereon. That during said period of over six years, the said company, in operating said mills & machinery, cut down & destroyed several thousand dollars' worth of timber & dug up & used several thousand dollars' worth of ores, and also permitted the mills, machinery, & dwellings, buildings, fences, &c., to go to decay for want of due repairs, to the great loss of the property. That the amount paid by Groot was $25,000, and by Olcott, Hovey, &co., $7,858, in all $32,858, and as an equivalent therefor the said parties occupied & operated said property for six years & some months, as before
240 described. That before the sale to Groot, the company was leasing said property for $5,000 per annum, but when they took possession again under the sale of 28th April, 1860, the property was so injured and out of repair that I was unable to lease the manufacturing & valuable part of the same, and was only able to rent the tillable lands for a very small sum, to wit, about $500, before the sale to Messrs. Bridgers, but little of which I could collect, owing to the war. I have realized nothing more from said property, before the sale of March, 1862. I would further state that I have no recollection of surrendering or ever having the certificates of stock, & I am of opinion that if they were delivered up, it was to P. W. Groot, & they should have been delivered back to A. Hoyl with the mortgage ; be that as it may, I certainly did not intend to surrender the corporate rights of the company, having no authority whatever to do so.

IV. To interrogatory IV. I had no knowledge or information whatever of any deed or conveyance from A. E. Hovey to Olcott &
241 Stephenson, of the date of 8th January, 1859, or any other date. The first intimation I ever received of such a thing was in reading the bill of complaint in this suit filed by the plaintiffs. I saw Mr. Olcott, Hovey, & Darling repeatedly, after this alleged deed, but they never informed me of such a transaction, and I saw no change in the management, agences, & dealings of the parties in possession different, after the alleged sale by Hovey, from what they were before & at the sale of 28th December, 1858.

V. To interrogatory V. E. S. Stephenson, Theodore Olcott, A. E Hovey, were all present at the transaction of 28th December, & assenting thereto. The same parties & myself met at Charlotte, pursuant to

agreement, on the 1st January, 1859, to draw & execute the writings. Stephenson, Olcott, Hovey, & myself were in a room together, in the Mansion House, until the writings were drawn & executed, I doing a part of the writings, & A. E. Hovey a part, & all freely talking over the whole matter together. At the same time & place a second mort-
gage of the property was executed to me & Grier by A. E. Hovey,
242 in behalf of the company we represented, to secure it against certain liabilities therein mentioned; and, as collateral thereto, a penal bond in $15,000 was given to me & Grier, as trustees for said company, which bond was signed by E. S. Stephenson, A. E. Hovey, & T. Olcott, in the order here written.

VI. To interrogatory VI. The answer to this question is contained in my answer to the 2nd & 3d interrogatories. They had a full knowledge of said sale, both from me & Mr. Darling, & made no objection thereto, except as to time, which was changed at the request of Mr. Olcott. I had no notice or intimation of any dissatisfaction with said sale until the bill of complaint in this case was served upon me.

VIII. To interrogatory VIII. I was not informed who was the purchaser under the transaction of 28th December, 1858; nor am I now able, from subsequent information, to state who was; but, from my intercourse with all the parties, & dealings with them, I believed & treated them all as interested in the purchase, to wit: Stephenson, Olcott, Hovey, and other parties in New York whose names I did not
243 learn; that their mode of doing business was to buy property on speculation, by making a small cash payment and giving their bond for balance of purchase-money on as long time as they could get, take a deed for the property, and give a mortgage to secure the debt. They then endeavored to sell out to other parties at a large advance before their notes fell due. In case they succeeded they would pay the debt & discharge the mortgage. In case they failed so to sell, they abandoned the property & and allowed the property to be sold under the mortgage. And residing out of the State, & of no means, or small means, of their own, they regarded themselves & were regarded as irresponsible. In this case Mr. Olcott was notoriously insolvent. Mr. Stephenson had been in command of some capital, but in Dec'r, 1858, was in failing circumstances, & soon after became insolvent. Mr. Hovey was in the same condition. Other parties in New York were connected with them, as I was led to believe. My impression is that the cash pay-
ment of $6,150, made on the execution of the deeds, on the 1st Jan-
244 uary, 1859, was counted out to me by Mr. Hovey. Whose money it was I was not informed, & do not now know. The balance of the payment, to wit: the two sums of $916 and $785 was deducted from the interest of E. S. Stephenson, as one of the stockholders of the High Shoals Company. I believed that in case these parties effected a sale they would all share the profits in certain proportions. The deed was made to Hovey by me, with the assent & knowledge of Stephenson & Olcott, both being present. Whether they, or either of them, suggested it, I do not remember. My impression is that I asked the whole party to whom the deed should be made, & by the agreement of all it was made to Hovey. I regarded them all as speculators, buying upon credit with intent to sell for cash at a large advance, & not intending to pay unless they did so sell. Hence, I looked to the property as the only security for the debt, & felt no interest in looking behind the legal parties, & made no inquiries as to their rights between themselves.

VII. To interrogatory VII. I would state that, in my belief, the
245 High Shoals property, at the sale made on the 28th April, 1860,

brought a fair price in its then dilapidated condition, and, for the reasons stated in my answer, it ought not to have been sold otherwise than in solido. I would further state that, on the 3rd day of August, 1868, Admiral Charles Wilkes called upon me in Lincolnton, & stated that he did so to see if a compromise could not be effected, & offered his services in effecting it. He went on to state that the matter was in litigation, & would be a long time unless thus settled; that if it was compromised I could get my money; and that he put no value upon the Bridgers' claim against him, but that I was entitled to my money. I replied that I did not see how a compromise could be effected by us, (Wilkes & myself,) as there were other parties interested, unless he represented Olcott & Company. He admitted that to be true, & again repeated the offer of his services for communicating any proposition to Mr. Olcott. He said Olcott claimed the property, & would pay
246 me the amount due on the mortgage. I replied that I knew Olcott; that he had no means of his own, & would not redeem, or could not, when he had the legal right to do so; that I recognized no right in him, & had no proposition to make to him. To this he replied that Olcott had the right, & would, beyond doubt, recover the land; that he (Olcott) had the means to pay, and he (Wilkes) knew he could command any amount of money, and knew one man who was backing Olcott, who was worth half a million. I finally told him that I was only the trustee of the High Shoals Company, and the attorney of Bridgers to collect the notes on him, (Wilkes,) and that I would write to Bridgers & ascertain his views of the matter, & let him know; that for myself, while I did not recognize the rights claimed by Olcott, if we (Wilkes, Bridgers, & myself) could compromise the matter between us, I was quite willing to do so, and then he and Olcott could settle as they saw fit. He replied that he did not wish to shoulder that suit himself, & he thought it ought to be first settled, & he again
247 offered his services for bearing propositions from me to Olcott. I again declined, & denied all his claim as false & fictitious. I should not omit to state that when Mr. Wilkes first came to me he began by stating that he was charged with being in collusion with Olcott, & stated that he was not, and barely knew him; saw him once when he came last into this State, & perhaps once in New York; that he had made inquiries about him, (Olcott,) and knew his ability to pay, & also knew his backers, & their ability. He also stated that he knew he (Wilkes) could buy from Olcott, but no trade was made, as charged. He repeated this disclaimer several times in the course of the interview. I did not charge it upon him then, or make any reply to his disclaimers. The interview broke up by my agreeing to communicate with Messrs. Bridgers, & let him know the result. It was understood expressly between us that the conversation was not confidential, & I the same day reduced it to writing, as above set forth, & am satisfied it is substantially correct.

And further this deponent saith not.

W. P. BYNUM.

Sworn & subscribed in *my* presence of—

J. D. SHAW,
Commissioner.

248 And the said J. D. Shaw, commissioner as aforesaid, do certify that the foregoing deposition of W. P. Bynum was taken by me at the place & on the day mentioned in the caption, the deponent

having been by me first duly sworn, and that the deponent did subscribe the testimony by him given, after the same was reduced to writing, as above, which was done by the deponent in my presence.

Given under my hand at the day & place in caption mentioned above.

J. D. SHAW, *Commissioner.*

RALEIGH, , .

Hon. W. A. GRAHAM:

The depositions of W. P. Bynum and others will be taken at the court-house in Lincolnton, N. C., on Saturday, the 17th of April, 1869, before V. A. McBee, S. P. Sherrell, J. D. Shaw, or one of them, as commissioner, to be read in evidence in the district court of N. C., to be held in Raleigh in June, 1869, in the case between T. Olcott vs. R. R. Bridgers and others.

B. F. MOORE,
Att'y for Def'ts.

MARCH 22ND, 1869.

249 Gov. Graham will please accept service of the above notice, & return it to me, or forward it to W. P. Bynum, esq., Lincolnton, & oblige, truly, &c.

B. F. MOORE.

Service accepted.

W. A. GRAHAM,
Atto., &c.

MARCH 27TH, 1869.

United States circuit court for the district of North Carolina.

THEODORE OLCOTT
vs.
JOHN L. BRIDGERS & OTHERS.

The following interrogatories are filed by the defendants, to be propounded to the following witnesses, viz: William P. Bynum, William Sloan, and others:

Interrogatory I. Are you acquainted with the parties to this suit?

Interrogatory II. Have you any, and if any, what, knowledge of the matters in controversy between the parties? In answer to this
250 question you will please give a detailed account of your connection therewith, & of the transactions between you and the plaintiff in relation thereto, up to & including the sale of the property in suit, to A. E. Hovey on 28th December, 1858.

Interrogatory III. Did you have any conversation or correspondence with the plaintiff after the said sale of 28th December, 1858; & if so, state when, where, & what it was in relation to this property?

Interrogatory IV. State (if you had any) what knowledge or information you had at any time of the alleged sale & conveyance of the property in suit, on 8th of January, 1859, from A. E. Hovey to the plaintiff & E. S. Stephenson.

Interrogatory V. State who were present & fully cognizant of all that took place at the sale of 28th December, 1858, to A. E. Hovey, & who were present at the execution & delivery of the deeds & mortgages made on the 1st and 2nd January, 1859.

Interrogatory VI. State whether the plaintiff T. Olcott & Stephenson had any, & if any, what, previous knowledge & notice of the
251 sale of the 28th April, 1860, when the property was bid off by Dr. William Sloan, and their action in relation to the knowledge of the time of said sale?

Interrogatory VII. If you have any knowledge of other matters relating & pertinent to the controversy in this suit, & not embraced in the foregoing questions, you will please state it.

Interrogatory VIII. Whom did you regard as the purchasers of the property at the sale of 28th December, 1858?

UNITED STATES OF AMERICA,
North Carolina District,
Circuit court, Fourth Circuit:

The President of the United States of America to V. A. McBee, S. P. Sherrell, & J. D. Shaw, or either one of you, greeting:

We, reposing especial trust and confidence in your integrity, do authorize and empower you to cause W. P. Bynum to appear before you at such time and place as you may appoint, and on oath to examine touching all such matters and things as shall know of and
252 concerning a certain matter of controversy pending in our circuit court of the United States for the district of North Carolina, wherein Theodore Olcott is plaintiff, and Charles Wilkes and others are defendants; and their depositions in writing, by you so taken, the same to transmit, sealed with your seal, to the judges of our said circuit court of the United States, to be held for the district of North Carolina, at Raleigh, on the first Monday in June next, to be read in evidence in behalf of the defendants in said controversy.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, the last Monday in November, 1868, and in the ninety-third year of the Independence of the United States.

CIRCUIT COURT OF THE U. S., N. C. DISTRICT.

N. J. RIDDICK, *Clerk.*

253 STATE OF NORTH CAROLINA,
Mecklenburg County:

The deposition of Dr. WILLIAM SLOAN, a witness produced by the defendants in a certain cause pending & at issue in the circuit court of the United States for the district of North Carolina, between Theodore Olcott, plaintiff, and John L. Bridgers and others, defendants, taken at the court-house in Charlotte, in the county of Mecklenburg aforesaid, on the 26th day of May, 1869, by me, Clement Dowd, commissioner appointed by said court for that purpose, and to be read in evidence on the trial of said cause, the said Dr. William Sloan being by me first carefully examined, cautioned, & sworn to testify the whole truth, did depose & say as follows to the interrogatories hereto appended, answering by number, to wit:

To inter. 1st he answers: Yes.

Inter. 2nd. I live near the High Shoals property, and knew the plaintiff, Olcott, to be the secretary of the northern company. I was the physician for the company. I was present at the sale of the
254 property on the premises under the Groot mortgage, on the 28th December, 1858. A. E. Hovey was also present, & became the

purchaser; the plaintiff, Olcott, & the late Eben S. Stephenson were also present. The sale was at public auction, and to the highest bidder.

Int. 3rd. I had various conversations with the plaintiff after that sale, and also some correspondence by letter. The principal conversations, & those most distinctly remembered by me, were after the last sale, to wit, the sale of the 28th April, 1860, at which I became the purchaser of the property, as agent for the High Shoal' Company.

Int. 4th. I had no knowledge or information of the alleged sale, by Hovey to the plaintiff, of the 8th January, 1859, until after this suit was instituted, & then only by the plaintiff's bill.

Int. 5th. I have already answered touching the sale of 28th Dec'r, 1858. Besides Hovey, Olcott, & Stephenson, there were many other persons present attending the sale. Plaintiff & Stephenson were fully cognizant of everything that transpired at said sale, & fully assented thereto. I do not now remember who were present when the
255 mortgages of the 1st & 2nd of January, 1859, were executed.

Int. 6th. I was, at the time of & for some time before & after the sale of April 28th, 1860, living within a few miles of the High Shoals property; practiced all through that country as a physician; I saw a number of letters from the plaintiff and Stephenson to Tho's Darling, who was their manager & agent at the High Shoals, in which they expressed the hope to be able to raise the money with which to purchase the property on the 28th April, 1860. The letters indicated that they were fully apprised of said sale. On the day of that sale, to wit, 28th April, 1860, there was a meeting of the stockholders of the High Shoals Company, when it was resolved that they would make the property bring the debt secured in the mortgage, and, with that view, I was requested by the company to act as their agent & make the property bring enough to cover the debt. A calculation was made & a sum fixed upon as sufficient to cover the debt, which sum I bid for the property, & it was knocked off to me at that sum. Hovey & Darling were present,
256 representing the interests of the northern company, and were apprised of & assented to the arrangement. I was also present when said Hovey signed the acknowledgement of tenancy, which is referred to & made part of the defendant Bynum's answer; the same was read over to said Hovey, & after Hovey was made fully aware of its contents, he signed it in my presence; he did so willingly and without hesitation. The plaintiff, Olcott, came to my house *in* early in the spring of 1861, (I was then living at the High Shoals;) he came in company with a Mr. Muir, whom he represented to be a capitalist seeking an investment in mineral lands, and Olcott stated that their purpose was to purchase the High Shoals property. Olcott went to see Col. Bynum with that view, & returned & stated that he had effected a short lease with Col. Bynum to explore the High Shoals property for minerals, with a view to purchase the same. He then effected a similar arrangement with me as to some individual property adjoining the High Shoals property. He then left my house, & never returned until after the war.

I had various interviews & some correspondence with the plaintiff
257 after the sale of the 28th April, 1860, & at no time did he ever set up claim or ever intimate or suggest a claim on said property, but invariably stated that his object was to purchase the property. Since the war he has proposed to me to join him in purchasing the property with a view to speculation. The property was always in market till sold. The plaintiff always recognized the regularity & validity of the sale of the 28th April, 1860, in his conversations with me. I never

understood that plaintiff, Olcott, was a man of capital, & he *we* was regarded as insolvent. Eben S. Stephenson was the capitalist of the concern, but about the time of the last sale he was in a sinking condition. He had, prior thereto, sold out his stock in the High Shoals Company to me, & shortly after that sale he failed in business for a large amount. I always understood that the plaintiff's interest in the northern company was a mere working interest, which was valuable only in the event of a successful working of the mine, or a resale at an advance on the cost. At the sale of the 28th April, 1860, there was quite a collection of people, & among them a company of capital-
258 ists who came with a view of purchasing the property, but after examining the property, they declined to bid the amount of the mortgage debt, & it was knocked down to me.

And further this deponent saith not.

W'M SLOAN.

Sworn to & subscribed in my presence.

CLEMENT DOWD,
Commissioner.

And I, the said Clement Dowd, commissioner as aforesaid, do certify that the foregoing deposition of Dr. William Sloan was taken by me on the day & at the place mentioned in the caption; the deponent having been by me first carefully examined, cautioned, & sworn to testify the whole truth, and that the deponent did subscribe the testimony by him given after the same was reduced to writing, as above, which was done by me. And I do further certify that I am not of counsel nor attorney for either of the parties, nor in any manner interested in the event of the said cause.

Given under my hand at the day & place in the caption above mentioned.

CLEMENT DOWD, *Com'r.*

259 And the complainant files exceptions to the said depositions as follows:

THEODORE OLCOTT
v.
CHARLES WILKES & AL.

The plaintiff excepts to the matter hereinafter stated, in the deposition taken in this case of the defendant William P. Bynum, and prays that, as to these matters, the same may be suppressed, namely:

I. He excepts to the statements on pages 6 & 7, that letters of a certain import were received from the plaintiff Olcott and E. S. Stephenson by the witness, & other letters sent from the witness, & from Thomas Darling to said Olcott & Stephenson, without producing said letters or accounting for their absence.

And to the statement that witness was informed by said Darling that the arrangement was satisfactory; the declarations of Darling not being competent evidence.

II. Also to the statement begin'ing with words "at the time" near bottom of page 7, & extending to the same words on page 8; it being a nar'ation of the witnesses intercourse with other persons then the parties plaintiff in this case, and not in their presence.

260 III. Also, to the paragraph on page 10, commencing "immediately after the sale," & extending to the words "that Hovey re-

mained, &c," being a nar'ation of acts & conversations of Thomas Darling, and a recital of the contents of letters said to have been received by him from the plaintiff & E. S. Stephenson, without the production of said letters or accounting for their absence; and the said Darling having no agency for a sale or disposition of the property in dispute.

IV. Also the statement on page 12, "and that in fact he did procure from me a mining lease in writing," no such writing being produced or its absence accounted for; and the further statement on same page, "I am informed," to the end of that paragraph, including the word "thereabouts," it being mere hearsay.

V. Also to the statement on page 14, line 13 or 14, commencing "that before the sale to Groot," down to "March, 1862," being all res inter alios.

VI. Also to that on p. 17, "They had full knowledge from me & Mr. Darling, & made no objection;" referring to the alleged correspondence already objected to, as being in writing and not produced.

VII. Also to that near bottom of p. 17, commencing, "that their mode, &c," and extending to the end of paragraph, with the words "to
261 believe" on p. 18, and to that on p. 19, near bottom, commencing, "I regarded them, &c;" & extending to the end of the answer to that interrogatory, being a more dispar'ing commentary on the plaintiff & his associates.

VIII. Also to that commencing p. 20, with the words, I "would further state," & extending to the end of the deposition, being a narration of a conversation between the witness and his co-defendants Charles Wilkes.

All of which the plaintiff is ready to maintain, &c.

W. A. GRAHAM, *Sol.*

And further day is given to the parties.

And afterwards, to wit, at rule day, on the first Monday in September, 1869, on motion of the complainant's counsel, it is ordered that it be referred to the clerk of this court to examine and make report on the exceptions taken by the complainant to the depositions of W. P. Bynum and William Sloan; and on the same day, to wit, the first Monday in September, 1869, the complainant files certain certificates of the transfer of stock in the High Shoals Mining and Manufacturing Company, which are admitted by the counsel of the defendants to be genuine, and are as follows:

262 *Transfer of shares of stockholders in the High Shoals Manufacturing Company.*

Certificate of stock.

25 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that William Phifer is entitled to twenty-five shares of stock in the High Shoals Manufacturing Company.

Transferrable by assignment, as provided by the laws of the corporation.

AND. HOYLE, *Pres't.*

25 shares.] THIS 2ND DAY OF FEBRUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, twenty-five shares of stock in the High Shoals Manufacturing Company.

WILLIAM PHIFER.

Witness:

JAMES W. OSBORNE.

Certificate of stock.

225 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that Andrew Hoyl is entitled to two hundred and twenty-five shares of stock in the High Shoals Manufacturing Company.

263 Transferrable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

225 shares.] THIS 10TH DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, my 225 shares of stock in the High Shoals Manufacturing Company.

ANDREW HOYL.

Attest:
CALEB W. HOYL.

Certificate of stock.

4 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that Daniel Hines is entitled to four shares of stock in the High Shoal Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

Four shares.] THE 9TH DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, four shares of stock in the High Shoal Mannufacturing Company.

D. S. HINES.

Witness:
W. E. ROSE.

264 Certificate of stock.

3 shares.] THE 7 DAY OF DECEMBER, 1847.

This certifies that Alexander Goodson is entitled to three shares of stock in the High Shoal Manufacturing Company.

Transferable by assignment, provided for by the laws of the corporation.

A. HOYL, *Pres't.*

3 shares.] THIS 11TH DAY OF JANUARY, 1854.

I hereby assign and transfer to P. W. Groot, of New York, three shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, provided for in the laws of the corporation.

ALEXANDER GOODSON.

Attest:
L. E. THOMPSON.

Certificate of stock.

11 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that Thomas Little is entitled to eleven shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *President.*

265 THIS 12 DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, eleven shares of stock in the High Shoals Manufacturing Company.

THOMAS LITTLE.

P. ROMARE, *witness.*

Certificate of stock.

2 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that James H. White and William Jenkins are entitled to two shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

Two shares.] THE 2ND DAY OF JANUARY, 1854.

We do hereby assign and transfer to P. W. Groot, of New York, two shares of stock in the High Shoals Manufacturing Company.

JAMES H. WHITE.
W'M JENKINS.

Witness:
JNO. L. WEATHERS.

Certificate of stock.

3 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that John Falls is entitled to three shares of stock in the High Shoals Manufacturing Company.

266 Transferable by assignment, as provided by the laws of the corporation.

A. HOYL, *Pres't.*

THE 2ND DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, three shares of stock in the High Shoals Manufacturing Company.

By JAMES H. WHITE, *As Agent for*
JOHN FALLS.

Test:
W'M JENKINS.

Certificate of stock.

15 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that Aaron Jenkins is entitled to 15 shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

15 shares.] JANUARY THE 9TH, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, 15 shares of stock in the High Shoals Manufacturing Company.

AARON JENKINS.

Test:
JA'S H. WHITE.

267 Certificate of stock.

8 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that J. Johnston is entitled to eight shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

8 shares.] THE 10TH DAY OF MARCH, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, eight shares of stock in the High Shoals Manufacturing Company.

JAMES JOHNSTON.

Test:
M. B. CALDWELL.

Certificate of stock.

150 shares.] THE 7TH DAY OF DECEMBER.

This certifies that W'm E. Rose is entitled to one hundred & fifty shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

150 shares.] THE 9TH DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, one hundred & fifty shares of stock in the High Shoals Manufactur-
268 ing Company.

W'M E. ROSE.

Witness:
JA'S H. WHITE.

Certificate of stock.

15 shares.] THE 15TH DAY OF APRIL, 1852.

This certifies that L. E. Thompson is entitled to fifteen shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

15 shares.] THE 11TH DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, fifteen shares of stock in the High Shoals Manufacturing Company.

L. E. THOMPSON.

Test:
JAMES H. WHITE.

Certificate of stock.

4 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that John R. Falls is entitled to four shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

269 THE 10TH DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, four shares of stock in the High Shoals Manufacturing Company.

JOHN R. FALLS.

Test: JAMES H. WHITE.

Certificate of stock.

9 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that Daniel Hoffman is entitled to nine shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

Nine shares.] THE 18TH DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, nine shares of stock in the High Shoals Manufacturing Company.

DANIEL HOFFMAN.

Test: JAMES H. WHITE.

Certificate of stock.

6 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that John Webster is entitled to six shares of
270 stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

THE 10TH DAY OF JANUARY, 1854.

I do hereby assign and transfer to P. W. Groot, of New York, six shares of stock in the High Shoals Manufacturing Company.

JOHN WEBSTER.

Witness: JAMES H. WHITE.

Certificate of stock.

24 shares.] THE 7TH DAY OF DECEMBER, 1847.

This certifies that E. A. Brevard is entitled to twenty-four shares of stock in the High Shoals Manufacturing Company.

Transferable by assignment, as provided by the laws of the corporation.

ANDREW HOYL, *Pres't.*

24 shares.] THIS 9TH DAY OF JANUARY, 1854.

I hereby assign and transfer to P. W. Groot, of New York, twenty-four shares of stock in the High Shoals Manufacturing Company.

E. A. BREVARD.

Test: L. E. THOMPSON.

271 Afterwards, to wit, at rule day, on the first Monday in December, 1869, the defendants file the second depositions of W. P. Bynum and William Sloan, and also the depositions of James H. White, which are opened in open court by the clerk, and are in the words and figures following, to wit:

272 UNITED STATES OF AMERICA,
North Carolina District,
Circuit Court, Fourth Circuit.

The President of the United States of America to Eli Pavorer and Samuel Lander, or either of them, greeting:

We, reposing especial trust and confidence in your integrity, do authorize and empower you to cause W. P. Bynum, William Sloan, James H. White, and William Morris, to appear before you, at such time and place as you may appoint, and them on oath to examine touching all such matters and things as they shall know of and concerning a certain matter of controversy pending in our circuit court of the United States for the district of North Carolina, wherein Theodore Olcott is plaintiff, and Charles Wilkes, Robert R. Bridgers, B. B. Barron, Jno. L. Bridgers in his own right and as executor of Powell, William P.
273 Bynum, and Thomas Grier, executors, &c., of Andrew Hoyle, William Sloan, and A. E. Hovey are defendants. And their depositions in writing, by you so taken, the same to transmit, sealed with your seal, to the judges of our said circuit court of the United States, to be held for the district of North Carolina, at Raleigh, on the last Monday in November next, to be read in evidence in behalf of the defendants in said controversy.

{ CIRCUIT COURT U. S. } Witness the Hon. Salmon P. Chase, Chief
{ NORTH CAROLINA. } Justice of the Supreme Court of the United States, at Raleigh, in said district, the first Monday in June, 1869, and in the ninety-third year of the independence of the United States.

N. J. RIDDICK, *Clerk.*

274 UNITED STATES OF AMERICA,
North Carolina District,
Circuit Court, Fourth Circuit.

In the suit pending in equity, in the said court, wherein Theodore Olcott is plaintiff, and Charles Wilkes, Robert R. Bridgers, B. B. Barron, Jno. L. Bridgers, in his own right and as executor of Powell, W. P. Bynum, and Thomas Grier, executors, &c., of Andrew Hoyl, William Sloan, and Aaron E. Hovey are defendants, the depositions of James H. White, William B. Morris, William Sloan, William P. Bynum, and others will be taken on the 20th day of November next, at the court-house in the town of Dallas, county of Gaston, State of North Carolina, to be read as evidence on behalf of defendants in the above-entitled cause.

BATTLE, MOORE, BRAGG, &c.,
Sol's for Defendants.

To Hon. W. A. GRAHAM,
Sol. for Pl'ff.

Service accepted Oct. 25th, 1869.

W. A. GRAHAM.

STATE OF NORTH CAROLINA,
Gaston County :

The deposition of W. P. Bynum, a witness produced by the defendants in a certain cause pending and at issue in the circuit court of the United States for the district of North Carolina, between Theodore Olcott, plaintiff, and Charles Wilkes, R. R. Bridgers, J. L. Bridgers, B. B. Barron, J. L. Bridgers as executor of Powell ; W. P. Bynum, and Thomas Grier, ex'rs, defendants. Taken at the court-house in Dallas, county of Gaston, on the 20th November, 1869, by me, S. Lander, a commissioner for that purpose, named in the commission hereto annexed, to be read in evidence in the trial of said issue.

The said W. P. BYNUM, being by me first carefully examined and cautioned, and sworn to testify the whole truth, did depose and say as follows :

Question 1. Are you acquainted with the handwriting of T. Olcott and E. S. Stephenson ?

Answer 1. I am, having received letters from each one of them, and having seen each write his name and signature to notes, receipts, and other writings.

Ques. 2. Look upon this letter, appended hereto, marked T. O., and say whose handwriting are the signatures thereto.

Ans. 2. The signature "T. Olcott" is in the handwriting of T.
276 Olcott, and the signature "Eben S. Stephenson" is in the handwriting of Eben S. Stephenson. The body of the letter I believe to be in the handwrite of T. Olcott.

Ques. 3. Are you acquainted with the handwriting of Thomas Darling ?

Ans. 3. I am, having often seen him sign his name, and corresponded with him.

Ques. 4. Look upon these two notes, hereto appended, each marked "T. D.," one dated High Shoals, April 5th, 1858, the other dated Long Creek, Oct. 4th, 1859, and say whether the signatures are in the handwriting of Thomas Darling.

Ans. 4. The body as well as signature in each note is in the handwriting of Thomas Darling.

Ques. 5. State whether you received the letter from T. Olcott & Eben S. Stephenson, marked "T. O.," as above set forth, when, and by whom you received it, how, and where, if at all, you answered it.

Ans. 5. The letter was delivered to me, in Lincolnton, N. C., by Thomas Darling ; it was in an unsealed envelope, now attached to the letter. The address to me on the back of the envelope, is in the handwrite of Thomas Darling ; I received it on the 3rd March, 1860, & so endorsed it on the envelope at the time. The letter, as Mr. Darling stated, had been enclosed to him, to be delivered to me & to procure a reply. I had advertised the sale to take place, I think, on the 8th March, 1860.
277 The letter from Olcott and Stephenson requesting a postponement of the sale to the 1st May, or as near thereto as I could. I agreed to postpone the sale to the 28th April, 1860, as I had engagements elsewhere on 1st May. At the request of Mr. Darling, I wrote a letter to that effect, and delivered to him for Olcott and Stephenson, dated, I think, on the same day, 3rd March, I also wrote a letter and mailed it the next day, addressed to Olcott & Stephenson, at New York, agreeing, as requested, to postpone the sale to the 28th April, 1860. I was afterwards

informed by Mr. Darling that they had received the notice of the postponement, and were gratified at the change. The change of the day of sale, from 8th March to the 28th April, was published in the Democrat, of Charlotte, N. C., and other places, on or about the 19th March, 1860.

Ques. 6. State whether you, at any time, executed a lease or license to T. Olcott to explore any part of the High Shoal property for minerals, and if so, discribe it.

Ans. 6. In the spring of 1861, while I was in attendance in court at Catawba County, N. C., Mr. Olcott called on me to procure a lease of part of the High Shoals property, which was sold under the mortgage by Hovey, for the purpose of exploring for gold and other miner-
278 als. He desired a lease for a year or longer. I refused a lease of such duration, informing him that the company desired to sell the property, and the encumbrance of such a lease might injure or defeat the sale. He offered to pay me three hundred dollars down for such lease to explore for minerals for 12 months. I declined, but offered him a license to explore the property for 3 or 4 months or thereabouts, which he finally accepted, and the lease or license was reduced to writing and delivered to him, I think in April, 1861.

Ques. 7. In a letter addressed by you to Wilson & Osborne, on file as evidence in this case, you say that, "under an arrangement with the mortgagers, A. E. Hovey, for them, became the purchaser," and in default of payment you sold under the mortgage made by Hovey, and James White became the purchaser for the old Hoyle company. In your answer you say that William Sloan became the purchaser; explain.

Ans. 7. My answer is correct; W'm Sloan was the purchaser, as agent of the old company. At the first sale of December 28th, 1858, when the negroes were sold, James White was spoken to in behalf of the old company, to bid off some of the negroes for them, & the mistake was inadvertently confounding the two sales. In answer to the first part of interrogatory 7, to wit, that, "under an arrangement with the mortgogors, A. E. Hovey for them became the purchaser &c." I reply that
279 the letter to Wilson & Osborne is explained thus, to wit: there was only one mortgagor, & that was P. W. Groot, who was in New York, and whom I had never seen. What I intended to convey was, that the "arrangement" was made with the parties there present, to wit, Olcott, Stephenson, Darling, & Hovey, who were then in actual possession, claiming under the orginal mortgagor, P. W. Groot, and representing his interest, by which they were to bid off the property, which was accordingly put up and bid off by A. E. Hovey. There was no understanding with me who was to do the bidding. The parties above named came to me at Mrs. William Johnston's, on the 25th December, 1858, three days before the sale, and proposed the arrangement as above stated as a means of obtaining an extension of credit and the postponement of an out and out sale. I refused to sanction the proposition, because I had no power or authority to do so, and so told them, but agreed to refer the matter to the stockholders on the day of sale, and abide their decision. The arrangement under which the property was bid off was made with the old stockholders on the 28th December, the day and place of sale.

Ques. 8. Were you ever retained as counsel by Olcott and Stephenson? Explain.

Ans. 8. I never was employed as their counsel, or consulted by
280 them or either of them, about the estate, as counsel. A part of the arrangement of 28th December, 1858, was that we should meet at Charlotte on 1st January, 1859, draw and execute the deed and

other writings, at the expense of the purchasers. We accordingly met there and were so engaged for two, if not three days, at the Mansion House. I offered to draw the writings, which consisted merely in copying the "Groot" deed and mortgage, with alterations to suit, and a second mortgage on the same property. When all was completed and money paid, Mr. Stephenson, or Olcott, or Hovey, I do not remember which, handed me a check for fifty dollars, which I accepted. It never for a moment came into my mind that I was thereby retained as counsel. I knew they had other counsel whom they had consulted.

Ques. 9. State, if any, what other charges were paid by the purchasers at the same time, referred to in the transaction of January 1st, at Charlotte.

Ans. 9. Another part of the agreement of 28th December, 1858, was that the purchasers should also pay the counsel fees and other costs which had accrued in some suits in equity then pending between the High Shoals Mining & Manufacturing Co., and Osborne, Thompson, & others. The counsel fees were due to Messrs. Boyden & Lander;
281 were paid to me by the parties as above, & by me were paid to Messrs. Boyden & Lander; the amount of other costs I do not remember, but were received and disbursed for the benefit of the old company, as agreed on.

Ques. 10. State what property came into your hands under the mortgage of Hovey, or in any other way belonging to or in any way connected with the High Shoals property.

Ans. 10. I know of nothing which did not belong to the estate originally and before the sale to Groot, except a steam-engine & fixtures; this engine was conveyed to me by Hovey on the 3d January, 1859, in a second mortgage, to indemnify the old company in certain cases therein specified; Thomas Darling, as agent of the High Shoals Mining and Manufacturing Co., afterwards sold this engine to William Sloan, in payment of said company's debts; I now claim said engine, to pay the liabilities provided for in said 2nd mortgage, which will reach near the value of the engine; subject to this 2nd mortgage, Dr. Sloan is the owner of the said engine or its value.

Ques. 11. What statements, if any, did Olcott make to you while in N. C., after the sale of 28th April, 1861?

Ans. 11. He expressed his regrets that his company had not been able to pay for the property as he expected, and led me to believe
282 in his letter of the 22nd February, asking for a postponement of the sale, and wished to know whether the company would still let them have the property if the money could be raised. I replied that the property was in market and the old company was compelled to sell, but that in case no sale was sooner effected to other parties, if he or his company would in a reasonable time raise the money, that I had no doubt but that he could get the property in payment of the residue of the purchase-money, and that I would advise the old company to take it; with this he expressed himself satisfied; I have not seen him since.

Ques. 12. In the letter of Olcott and Stephenson to you, they state that they had already paid near $60,000 towards the property; how is this?

Ans. 12. P. W. Groot, in 1854, paid $25,000; Olcott & Co., in 1859, $7,858, of which $785 was for Stephenson's share of the sale of the negroes; the negroes belonged to the property, & were sold for $9,100, and credited on the debt; the sum actually paid by Groot, Olcott &

Co., was $32,100, and they had possession from January, 1854, to 1st May, 1860.

Ques. 13. State whether you witnessed a conveyance of the personal property of the High Shoals Mining & Manufacturing property to
283 Dr. William Sloan, & if so, what property, & where and what was the consideration thereof?

Ans. 13. On the 28th April, 1860, the day of the sale of the High Shoals property under the Hovey mortgage, I witnessed the signature of Thomas Darling to a conveyance of all the personal property which was not embraced in the Hovey mortgage, such as household property, mules, wagons, stock, an engine & fixtures, subject to a prior mortgage by Hovey to W. P. Bynum, trustee, &c.; this conveyance was made by Thomas Darling, as agent of the High Shoals Mining & Manufacturing Company, to William Sloan, and the consideration thereof, as there stated by the parties, was money loaned to said company from time to time up to said sale, and for medical services rendered, & debts of said company, which Dr. Sloan then assumed; the said conveyance was drawn by me, at the request of the parties, on the 28th April, 1860, and I think immediately after the sale of the property under the mortgage of Hovey. One of the debts there assumed by Dr. Sloan as part of the consideration of said conveyance was a note for $140, given to me for the hire of a negro for one year by the High Shoals Mining and Manufacturing Co.; the negro was one sold at the sale of December 28th, 1858, and was hired to said company about the middle of Jan-
284 uary, or later, in 1859.

Cross-examined by plaintiff's couns'l:

Ques. 1. Have you a personal interest in the property involved in this suit? If so, state what *what* interest you have, and when and from whom was it acquired.

Ans. 1. To question 1st put by the plaintiff, I answer that in 1857 & '8, I purchased some small interest in said company, (old,) which now amounts to about twelve hundred dollars. These interests were purchased from Daniel Huffman, Ehh. Goodson's heirs, & R. A. & A. F. Brevard; the exact date I cannot now give, not having any memoranda before me; I think, however, none were bought later than 1860.

Ques. 2. In the section of country in which this property is situated, have you ever known a piece of property of the value of $40,000, or upwards, set up at auction sale, in the lump, for cash, except this?

Ans. 2. I answer that I have never known property of the value of $40,000 in this section to be set up at auction sale, for cash, except this. In answer to the second part of said question, I answer that the King's Mountain property, close by the High Shoals, has been regarded as approaching it in value, & was recently sold for $41,000, and is now ordered to be sold at an auction, for cash, by a decree of Gaston su-
285 perior court, to pay the mortgage debt; also the Brevard Furnace lands, and the Graham Furnace lands, though not of as great value, yet somewhat approach it, and have been sold in "solido," though embracing many thousand acres of land.

Ques. 3. Was or was not the High Shoals property at that time by far the most valuable piece of property in that section; if not, what other piece of property was equal to or approached it in value?

Ans. 3. I regard it as the most valuable property in that vicinity; the other part of the question is answered in the answer to question No. 2.

Ques. 4. Was or was there not at said alleged sale any person who

could have paid down $42,000, or more, and have bought according to the terms of sale? if so, name them.

Ans. 4. I do not now remember who all were present at the last sale. I endeavored to induce Mr. Morehead & Mr. Breme & Mr. Alexander, of Charlotte, to come and bid. They did come to the first sale of Dec. 28th, 1858, but after viewing the property, were not willing to give more than $35,000 for it. I think they could have raised the money. I do not think either of these gentlemen were at the sale of 25t April, 1860, or any one who could have paid $42,000 cash down.

Ques. 5. How many different water-powers are there on this property of 14 to 16 thousand acres of land suitable for machinery; on
286 what streams are they, and how far apart?

Ans. 5. I know of but two water-powers on the property—High Shoals and Long Creek; upon the former of which is the rolling-mill, &c., & upon the latter, the furnaces. They are 6 miles apart, and used in connection generally—the furnaces upon Long Creek making metal, to be rolled into iron or made into nails, &c., at High Shoals.

Ques. 6. Are not the beds or veins of iron ore on this property very abundant?

Ans. 6. I am not very familiar with the ore beds. I am informed that there are beds of more or less value. I think they are abundant, though sometimes troublesome to get. The best ore-bed is in litigation, & in the possession of another party.

Ques. 7. How many different iron-works, furnaces, & forges had John Fullenwider, or his son Henry, on this property, when either of them was the owner of it, and how far apart were they?

Ans. 7. I know of but the two works—at Long Creek & High Shoals. I did not know the property when owned by John or Henry Fullenwider, but think there were no other works upon it at any time.

Ques. 8. How many bids were made at the sale alleged to have been made 28th April, 1860, and who were the bidders, and who was the crier?

Ans. 8. The crier at the sale of April 28th, was James
287 Quinn, & there was but one bidder for the company—William Sloan. I am not aware that there were any opposition bids, or that he made more than one bid; and further this deponent sayeth not.

W. B. BYNUM.

Sworn and subscribed in my presence.

SAMUEL LANDER,
Commissioner.

And I, the said S. Lander, commissioner as aforesaid, do certify that the foregoing deposition of W. P. Bynum was taken by me at the place and on the day mentioned in the caption, the deponent having been by me first carefully examined and cautioned, and sworn to testify the whole truth, and that the deponent did subscribe the testimony by him given, after the same was reduced to writing as above, which was done by me.

And I do further certify I am not of counsel nor attorney to either of the parties, or in any manner interested in the event of the said cause. Given under my hand at the day & place in the caption above-mentioned.

SAMUEL LANDER,
Commissioner.

[$226 45] LONG CREEK, *Oct. 4th*, 1859.

One day after date we promise to pay James H. White, or order, two hundred and twenty-six $\frac{45}{100}$ dollars, for value received.

"T. D."

High Shoals Mining & Manufacturing Company,
Per THOMAS DARLING, *Ag't.*

288 HIGH SHOALS, *April 5th*, 1858.

One day after date we promise to pay S. A. Torrance, or order, one hundred and twenty $\frac{00}{100}$ dollars, for value received.

High Shoals M. & M. Co.
"T. D." P'r T. DARLING, *Ag't.*
As security, JAMES H. WHITE.

Endorsed as follows:

[$143 00.]

Received of James H. White one hundred and forty-three dollars, principal and interest, on the within note.

FEB'Y 21ST, 1862.

S. A. TORRENCE.

NEW YORK, FEB'Y 25TH, '60.
4 *Bowling Green, Room* 3.

DEAR SIR: You will recollect that when the High Shoal property changed hands in January, 1859, we stated to you that our aim would be to pay off the entire amount of the mortgage before the expiration of the year. To bring about a result so desirable to all parties interested, we have taken the position with our friends, in organizing a new company, that a less sum than the whole amount required to satisfy the mortgage would not answer our purpose. This, we have felt assured, was the true policy for us to pursue, and the only ground we could take and do justice to them, and realize what we had encouraged you to expect. We are now, we think, on the eve of accomplishing our
289 aim, having already a large part of the required sum offered to us, but as we may not be prepared with the whole amount on the day fixed by you in the advertisement, we beg to ask the postponement of the day of the sale for a short time, under the conviction that we shall be able to meet your wishes and our own at a very early day, and much in advance of the average time named in the mortgage. We should like to have the time of payment put off to the 1st May, but if that is longer than you think ought to be granted, we must be satisfied with a shorter date.

Altho', by the strict letter of the contract, you have the right to require us to fulfill its conditions punctually, yet, in view of the large amount already paid to the stockholders of the company which you represent, (nearly $60,000,) and the still larger sum expended upon the property, we hope it will not be deemed necessary to compel us to sacrifice these large disbursements at a time when the delay of a few weeks will enable us to protect them, and cannot jeopardise or in any way prejudice the rights of those you represent.

Recollecting & appreciating the good feeling evinced towards us by the stockholders of the old company during our long struggle with outside claimants, we dare venture to hope for the continuance of
290 their indulgence for the brief period asked for to enable us to bring this our determined effort to cancel the entire debt to a successfull issue.

Believing that your good wishes are with us, and that you will, as far as you can consistently with your obligations to others, grant our request,

We are, very respectfully, yours, &c.,

EBEN S. STEVENSON.
T. OLCOTT.

To W. P. BYNUM, Esq., *Ex'r*, *&c.*

"T. O."

$75,000, first cost.
40,000, present mortgage.

35,000, principal paid.
22,500, 5 years' interest on $75,000.

$57,500.

E. S. Stephenson, Feb'y 23rd, 1860; received of Darling, March 3rd, 1860. Answered immediately, postponing sale to 28th April, according to request, having urgent business elsewhere on 1st May. "T. O."

291 (A)

For and in consideration of the sum of two thousand dollars, due & owing to William Sloan, & the further sum of one dollar, in hand paid, we, the High Shoals Mining & Manufacturing Company, hereby bargain & sell unto said William Sloan the following property, to wit: six mules, two horses, four wagons, one cart, the steam engine, pumps, boilers, & all machinery pertaining thereto; all gold machinery, tools, all household & kitchen furniture, & all other property of every description, not embraced in two mortgages made to secure the High Shoals Manufacturing Company, such as hogs, cattle, & stock of every description; a safe, a letter-press, beds & furniture; to have & hold to said William Sloan & his assigns forever.

April 28, 1860.

High Shoals Mining & Manufacturing Co.
Per THOMAS DARLING, *Ag't.*

Test: W. P. BYNUM.

292 STATE OF NORTH CAROLINA, *Gaston County:*

The deposition of Dr. W'm Sloan, a witness produced by the defendants in a certain cause pending at & issue in the circuit court of the United States for the district of North Carolina, between Theodore Olcott, plaintiff, and Charles Wilkes, R. R. Bridgers, J. L. Bridgers, B. B. Barron, J. L. Bridgers, as agent of Powell, W. P. Bynum, & Thomas Grier, ex'rs, defendants, taken at the courthouse, in Dallas, county of Gaston, on the 20th of November, 1869, by me, S. Lander, a commissioner for that purpose named in the commission hereto annexed, to be read in evidence on the trial of said issue.

The said Dr. WILLIAM SLOAN, being by me first carefelly examined and cautioned, and sworn to testify the whole truth, did depose and say as follows:

Ques. 1. Are you acquainted with the handwriting of T. Olcott, and E. S. Stephenson?

Ans. 1. I am.

Ques. 2. Look at this letter appended to the deposition of W. P. Bynum, marked "T. O.," and dated 23rd Feb'y, 1859, and state in whose handwrite are the signatures thereto.

Ans. 2. The signatures are those of E. S. Stephenson, and T. Olcott, and are in their handwriting.

Ques. 3. Are you acquainted with the handwriting of Thomas
293 Darling; and if so, state in whose handwrite are the notes marked "T. D." and annexed to W. P. Bynum's deposition?

Ans. 3. I am; they are in the handwriting of Thomas Darling.

Ques. 4. Did you receive any letters from Olcott or Stephenson since the sale of 28th April, 1860, relating to the H. S. property?

Ans. 4. I have received letters from T. Olcott relative to the High Shoals property.

Ques. 5. Can you produce them?

Ans. 5. I don't know.

Ques. 6. Have you made diligent search for them, and are you satisfied they are lost or destroyed?

Ans. 6. I have searched for them diligently, but have been unable, as yet, to find them.

Ques. 7. State the contents of them, if you are able, in reference to the sale of April 28th, 1860?

Ans. 7. I have received from T. Olcott several letters since the war in regard to the High Shoals property, in which there was no special reference to sale of April 28th, 1860, but proposing to go in with me to get control of the property, by bond or otherwise, with a view of selling the same upon speculation.

Ques. 8. Who bid off the High Shoals property at the mortgage sale of 28th April, 1860; for whom was it done, and by what authority?

Ans. 8. On 28th day of April, 1860, there was a meeting of the stock-
holders of the old High Shoals company, at the High Shoals, it
294 being the day and place advertised for the sale of said property under the mortgage executed to them by the High Shoals Mining & Manufacturing Company, known as the "New York Company;" and upon a full and free discussion in regard to the purchase of the property it was determined by them to make the property bring the mortgage-money, and I, as one of the company, was authorized by the company to bid it off for said company, or make it bring the mortgage-money. The property was then put up at public sale, and, in obedience to said instructions, I became the purchaser for the company.

Ques. 9. When did you move to the High Shoals; from whom did you rent; how long did T. Darling remain; what authority did he claim or exercise over the property after the sale of 28th April, 1860; and for what purpose did he remain, and by what permission?

Ans. 9. I moved to the High Shoals in latter part of the year 1860, or early in 1861; I rented the property from W. P. Bynum, then the acting president of the old High Shoals company; Thomas Darling remained there till about mid-summer, in the year 1861; he neither claimed nor exercised any authority whatever over the property; he was there
merely as a guest of mine, remaining through courtesy for me,
295 with the hope that the New York company, whose agent he was, might again re-purchase the property, and was there simply by my permission.

Ques. 10. What did he say to you in reference to the sale of 28th

April, the effect thereof, and the notice of the sale to T. Olcott? (Plaintiff objects to the above question upon the ground that his interest in the company had ceased.)

Ans. 10. He expressed himself satisfied with the sale, & felt grateful to the old company for the indulgence that he, as agent, at the request of the New York company, had asked for and received at their hands; that the effect of the sale would require them, if they had any further connection with said property, to re-purchase the same. The notice of sale had been full to Mr. Olcott and all parties connected with the New York company.

Ques. by the plaintiff's counsel:

Ques. 11. State when these declarations were made to you?

Ans. 11. These declarations were made before, at, and after the sale of 28th April, 1860.

Ques. 12. State if you know when Darling's agency ceased.

Ans. 12. He continued to act as agent until he left here in the summer of 1861; after which time I did not see him until after the war.

Ques. 13. State what transactions T. Darling performed, if any, as the agent of the High Shoals Mining and Manufacturing Company,
296 and set forth, if you can, the evidence thereof?

Ans. 13. Thomas Darling still continued to perform, exercise, and act as the agent of the High Shoal Mining & Manufacturing Company, in closing up the affairs of the company, until he left this section, in the summer of 1861, for the North. The exhibit hereto annexed, marked (A,) is a correct copy ot the original transfer made to me, and executed by him as their agent, for the personal effects of said company, in part payment of their indebtedness to me.

Ques. 14. State whether or not, in your judgment, the High Shoal property could have been sold in separate parcels with advantage to any of the parties concerned, or how otherwise?

Ans. 14. That question was fully discussed by the stockholders of the original company before the sale, and it was deemed by them totally impracticable, as they could not, by such a course, obtain money enough to pay off the debt, and, in my judgment, it would have been deleterious to the interest of all parties concerned to have sold otherwise than in bulk, as I am satisfied it would not have brought as much money if sold in any other way.

Cross-examined:

Ques. 1. Do I understand you to say that it would conduce to the interest of the mortgager that a property of this value and di-
297 mension be put up in the bulk & for cash, and *others* sold?

Ans. 1. The property might have been sold to better advantage on credit, but, if sold for cash, it would have been better to have sold it in bulk.

Ques. 2. State what interest the New York company possessed for their agent (Darling) to superintend after the sale of April 28th, 1860?

Ans. 2. They possessed no property, but were owing debts in the country, which Darling was remain to settle.

Ques. 3. You stated, in answer to interrogatory 11, in regard to Darling's declarations, that they were made before, at, and after the sale; now please state if they were identical at each of the times.

Ans. 3. No.

Ques. 4. Have you a personal interest in the property involved in this suit? if so, state what interest you have, and when, and from whom it was acquired.

Ans. 4. I have; my interest consists in shares purchased from Eben S. Stephenson and Aaron Jenkins; the number of shares I don't recollect; the exact time I can't say, but it was before the sale of 28 April, 1860.

Ques. 5. In the section of country in which this property is situated, have you ever known a piece of property of the value of $40,000, or upwards, set up at auction sale, in the lump, for cash, except this?

(Objected to by plaintiff's counsel.)

Ans. 5. I don't know of any such, to my own knowledge.

298 Ques. 6. Was or was not the High Shoal property at that time by far the most valuable piece of property in that section; if not, what other piece of property was equal to or approached it in value?

Ans. 6. It was regarded as one of the most valuable pieces of property in this country, but at that time was in a delapidated state.

Ques. 7. Was or was there not at said alleged sale any person who could have paid down $42,000 or more, and have bought according to the terms of sale? If so, name him.

Ans. 7. I think there were several persons, namely, Jasper Stowe, Jno. L. Morehead, & others; my recollection is that it was the understanding that responsible persons could have ten days within which to pay it.

Ques. 8. How many different water-powers are on this property, of 14 to 16 thousand acres of land, suitable for machinery; on what streams are they, and how far apart?

Ans. 8. There are two water-powers upon the property that have been improved; the one upon the South Fork of Catawba River, known as the High Shoals, the other upon Long Creek, about seven miles apart.

Ques. 9. Are not the beds or veins of iron ore on this property very abundant?

Ans. 9. They are so represented, and I believe them to be so.

299 Ques. 10. How many different iron-works, furnaces, and forges had John Fullenwider, or his son Henry, on this property when either of them was the owner of it, and how far apart were they?

Ans. 10. I knew nothing of the property during their ownerships?

Ques. 11. Did you bid at said sale; if so, how many bids did you make, and who bid against you?

Ans. 11. I did, but don't know how many bids I made, or who bid against me.

Ques. 12. Were you bidding for yourself, and prepared to pay down the cash if the property were knocked down to you?

Ans. 12. I was bidding for the High Shoal Company, selected by them for that purpose, and, for that reason, did not expect to pay the money down, as the understanding was that if the property were knocked down to me the bid should be discounted upon the mortgage debt.

Ques. 13. Was there any agreement between Messrs. Bynum & Grier, or either of them, and yourself that if you purchased it should be considered the bid of the High Shoal Company, and that they should become trustees for the company without any change of title; if so, was the agreement reduced to writing?

Ans. 13. There was no such agreement between Messrs. Bynum & Grier & myself; it was the understanding that if I became the purchaser I was to take title, and hold it subject to the instructions of the company.

300 Ques. 14. Was not the said sale of April 28, 1860, made for the purpose of closing out the interest of the mortgagers?

(This question was objected to by defendants' counsel as being a question of law.)

Ans. 14. Yes, it was.

Re examined:

Ques. Do you mean by your last answer to convey the idea that the land had been mortgaged, or how otherwise?

Ans. I mean that the property was sold by virtue of the terms of the trust or mortgage, whichever called.

And further this deponent saith not.

WM SLOAN.

Sworn and subscribed in my presence.

SAMUEL LANDER,
Commissioner.

And I, the said Sam'l Lander, commissioner as aforesaid, do certify that the foregoing deposition of William Sloan was taken by me at the place and on the day mentioned in the caption, the deponent having been by me first carefully examined and cautioned, and sworn to testify the whole truth, and that the deponent did subscribe the testimony by him given, after the same was reduced to writing as above, which was done by me.

And I do further (certify) I am not of counsel nor attorney to either of the parties, or in any manner interested in the event of the said cause.

301 Given under my hand the day and place in the caption above mentioned.

SAM'EL LANDER,
Commissioner.

STATE OF NORTH CAROLINA, *Gaston County:*

The deposition of James H. White, a witness*ed* produced by the defendants in a certain cause pending and at issue in the circuit court of the United States for the district of North Carolina, between Theodore Olcott, plaintiff, and Chas. Wilkes, R. R. Bridgers, J. L. Bridgers, B. B. Barron, J. L. Bridgers, as executor of Powell, W. P. Bynum, and Thomas Grier, ex'rs, defendants; taken at the courthouse, in Dallas, county of Gaston, on the 20th November, 1869, by me, S. Lander, a commissioner for that purpose named in the commission hereto annexed, to be read in evidence on the trial of said issue.

The said JAMES H. WHITE being by me first carefully examined and cautioned, and sworn to testify the whole truth, did depose and say as follows:

Ques. 1. Are you acquainted with the handwriting of Thomas Darling; and, if so, look upon this note, attached to the deposition of W. P. Bynum, and marked "T. D.," for $226 45, dated Oct. 4, 1859.

302 Ans. 1. I am; and I know it to be in the handwriting of Thomas Darling, and given at the time it purports to have been given.

Ques. 2. State what business Thomas Darling was following at that time, and in whose employ he was.

Ans. 2. He was superintending, as I understood it; managing and transacting their business, as he had been for several years previous; a part of the consideration of said note was for money lent him to pay

off a debt of High Shoal Mining & Manufacturing Company; the balance for the use of the company.

Examined by plaintiff's counsel:

Ques. 1. Was your statement in interrogatory No. 2 based upon your own knowledge or not?

Ans. 1. This information was derived from Thomas Darling, but I know, of my own knowledge, that Darling was superintending said property.

Ques. 2. Have you a personal interest in the property involved in this suit? &, if so, state what interest you have, and where and from whom it was acquired.

Ans. 2. I have none; but formerly represented a small interest.

Ques. 3. In the section of the country in which this property is situated, have you ever known a piece of property of the value of
303 $40,000, or upwards, set up at auction sale, in the lump, for cash, except this?

Ans. 3. I don't think I have; but have known valuable property to be put up for sale in the lump, but whether for cash or not I don't know.

Ques. 4. Was or was not the High Shoals property, at that time, by far the most valuable piece of property in that section; if not, what other piece of property was equal to or approached it in value?

Ans. 4. It was generally considered the best property of the kind, in the section; there were other valuable manufacturing establishments, but whether or not of equal value I cannot say.

Ques. 5. Was or was there not, at said alleged sale any person who could have paid down $42,000 or more, and have bought according to the terms of sale? if so, name him.

Ans. 5. There were men there who would readily have been taken for that amount, but whether or not they had the cash in their pockets, I don't know. Thomas Brene and Jno. L. Morehead were present.

Ques. 6. State if you were present when the said property was sold.

Ans. 6. I was there when these men were there. I was there at one sale. I think I was there when it was sold.

Ques. 7. How many different water-powers are there on this property, of 14 to 16 thousand acres of land, suitable for machinery;
304 on what streams; where are they; and how far apart?

Ans. 7. There are but two worthy of notice; the furnace is on Long Creek; the High Shoals is on south fork of Catawba River; from 6 to 7 miles apart.

Ques. 8. Are not the beds or veins of iron-ore on this property very abundant?

Ans. 8. There are a good many beds of ore on the land, but it is getting difficult to get.

Ques. 9. How many different iron-works, furnaces, & forges had John Fullenwider, or his son Henry, on this property when either of them were owners of it; and how far apart.

Ans. 9. There are but the two places—Long Creek and High Shoals—about 6 or 7 miles apart.

Ques. 10. How many bids were at the alleged sale on 28th April, 1860; and who were the bidders; and who was the crier?

Ans. 10. I can't say how many bids were made, nor who were the bidders; my impression is that there was but one bid made; I think James Quinn was the crier.

Ques. 11. Did you bid at said sale; if so, how many bids did you make, and who bid against you?

Ans. 11. I have no recollection of making a bid.

Ques. 12. Was there any agreement between yourself and Messrs. Bynum & Grier that if you purchased it, it should be considered
305 the bid of the High Shoals Company; that they should become trustees for the company without any change of title; if so, was the agreement reduced to writing?

Ans. 12. I have no recollection of any agreement in writing or otherwise.

Direct examination resumed:

Ques. 13. State if you are well acquainted with this property; and, if so, whether it is susceptible of a division without great injury to its value.

Ans. 13. I have been acquainted with this property for 30 years, & was once the manager for Fullenwider; and my opinion is that it cannot be divided and retain its value, and when divided it will destroy its value as an iron property.

By plaintiff's counsel:

Ques. 14. Was there not a great deal of land, out of this body of 14 to 16 thousand acres, which possessed no iron or other ores?

Ans. 14. Yes, there is.

Ques. 15. Would it have injured this body of land to have divided it?

Ans. 15. I think it would have injured it very much, as the land is fit for nothing but coaling ground. And further this deponent saith not.

JAMES H. WHITE.

Sworn and subscribed in my presence.

S. LANDER, *Commissioner.*

306 And I, the said S. Lander, commissioner as aforesaid, do certify that the foregoing deposition of James H. White was taken by me at the place and on the day mentioned in the caption, the deponent having been by me first carefully examined and cautioned, and sworn to testify the whole truth, and that the deponent did subscribe the testimony by him given after the same was reduced to writing as above, which was done by me.

And I do further certify that I am not of counsel nor attorney to either of the parties, or in any manner interested in the event of the said cause.

Given under my hands at the day and place in the caption above mentioned.

S. LANDER,
Commissioner.

307 UNITED STATES OF AMERICA,
District of North Carolina:

United States circuit court, fourth district.

THEODORE OLCOTT
v.
JOHN L. BRIDGERS & OTHERS.

The following interrogatories are filed by the defendants to be pro-

pounded to the following witnesses, viz: William P. Bynum, William Sloan, and others:

Interrogatory 1st. Are you acquainted with the parties to this suit?

Interrogatory 2nd. Have you any, and if any, what knowledge of of the matters in controversy between the parties? In answer to this question, you will please give a detailed account of your connection therewith, and of the transactions between you and the plaintiff in relation thereto, up to and including the sale of the property in suit to A. D. Hovey, on the 28th December, 1858.

Inter'ogatory 3rd. Did you have any conversation or corres-
308 pondence with the plaintiff after the said sale of 28th December, 1858? and, if so, state when, where, and what it was, in relation to this property.

Inter'ogatory 4th. State, if you had any, what knowledge or information you had, at any time, of the alleged sale, and conveyance of the property in suit, on the 8th January, 1859, from A. E. Hovey to the plaintiff and E. S. Stephenson.

Interrogatory 5th. State who were present and fully cognizant of all that took place at the sale of 28th December, 1858, to A. E. Hovey, and who were present at the execution and delivery of the deeds and mortgages made on the 1st and 2nd January, 1859.

Interrogatory 6th. State whether the plaintiff, T. Olcott and Stephenson, had any, and if any, what previous knowledge of the sale of 28th April, 1860, when the property was bid off by Dr. William Sloan, and their action in relation to the knowledge of the time of said sale.

Interrogatory 7th. If you have any knowledge of other matters
309 relating and pertinent to the controversy in this suit, and not embraced in the foregoing questions, you will please state it.

Interrogatory 8th. Whom did you regard as the purchasers of the property at the sale of the 28th December, 1858?

CIRCUIT COURT OF THE U. S. DISTRICT N. C. } I, N. J. Riddick, clerk of the United States circuit court for the district of North Carolina, do hereby certify that the foregoing is a true copy of the inter'ogatories filed in the suit in equity in this court, in T. Olcott is plaintiff and John L. Bridgers and others are defendants. In testimony whereof I hereunto set my hand and affix the seal of said court, at office in Raleigh, this 17th May, 1869.

N. J. RIDDICK, *Clerk.*

310 UNITED STATES OF AMERICA,
North Carolina, Circuit Court, Fourth Circuit:

The President of the United States of America to Clement Dowd, greeting:

We, reposing especial trust and confidence in your integrity, do authorize and empower you to cause William Sloan to appear before you at such time and place as you may appoint, and him on oath to examine, touching all such matters and things as he shall know of and concerning a certain matter of controversy pending in our circuit court of the United States for the district of North Carolina, wherein Theodore Olcott is plaintiff and John L. Bridgers and others are defendants And his deposition in writing, by you so taken, the same to transmit, sealed with your seal, to the judges of our said circuit court of the United States, to be held for the district of North Carolina, at Raleigh,

on the first Monday in June next, to be read in evidence in behalf of the defendants in said controversy.

{ CIRCUIT COURT OF THE U. S. DISTRICT N. C. } Witness the Hon. *Samuel* P. Chase, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, the third Monday in November, 1868, and in the ninety-second year of the independence of the United States.

N. J. RIDDICK, *Clerk.*

311 And on the rule day aforesaid, the complainant files exceptions to the said second depositions of W. P. Bynum and William Sloan, which said exceptions are in the words following, to wit:

312 Circuit court of the United States, district of North Carolina.

THEODORE OLCOTT
v.
CHARLES WILKES & OTHERS.

1. The plaintiff excepts to the second deposition of the defendant, W'm P. Bynum, for that the whole answer to question 13th is not admissible evidence, for want of production of a written instrument therein mentioned or accounting for its non-production.

2. The plaintiff also excepts to the second deposition of the defendant, William Sloan, because, in his replies to questions 4, 5, 6, 7, letters of correspondence are spoken of without being produced or their non-production sufficiently accounted for.

3. He also excepts to the answer to question 8, *except* the words 'I become, &c.," in the last two lines, as irrel*a*vant.

4. Also to question and answers No. 10 & 11, to which objection was made before the commissioner.

5. Also to answer 13, as it relates to Exhibit A.

And he prays that in these particulars the said depositions be suppressed.

Nov. 30th, 1869.

W. A. GRAHAM,
Sol. for Pl'ff.

313 In circuit court U. S., district of N. C., June, 1869.

T. OLCOTT
v.
CHARLES WILKES & AL.

The plaintiff excepts to the deposition of the defendant, W'm Sloan, examined as a witness in this cause, for that, on page third of the deposition, latter part of line 8, from the words "I saw," to the words "April, 1860," in line 14, there is a statement of the contents of alleged letters, without the production of said letters or any excuse or notice for secondery evidence of the same; and therefore he prays that this part of said deposition may be suppressed.

All of which he is ready to maintain, &c.

W. A. GRAHAM,
Sol. for Pl'ff.

314 And on the motion of the complainant, it is ordered that the said exceptions be referred to the clerk of this court for examination and report, and further day is given to *to* the parties.

Afterwards, to wit, on rule day, first Monday in January, 1870, a certified copy of Andrew Hoyl's will is filed as an exhibit by the defendant, W. P. Bynum, which is in the words and figures following, to wit:

315 *Copy of last will & testament of Andrew Hoyl, dec'd.*

I, Andrew Hoyl, of Hoylsville, Gaston County and State of North Carolina, being of sound mind and sufficient memory, by the mercy of God, but being well stricken in years, do make and establish this to be my last will and testament, this 25th day of November, 1856.

1st. I commend my soul to Almighty God, and my body to be burried in a Christian manner at the discretion of my friends.

1st. I will & bequeath to my only & loved but afflicted son Caleb W. Hoyl, all that tract or parcel of land on which I live, surveyed & platted by Isaac Holland, esq., for Caleb W. Hoyl, begin'ing in the old river ford below the bridge, containing the home tract, the Coxe, Hovis, & Taylor places, by estimation seven hundred & seventy acres, be the same more or less, together with all the farming tools he may need; one road-wagon and gears; also the wood or farm wagon; also the grey mare's breed are his now; also one good horse & mule; half of
316 all the cattle, hogs, & sheep; all the grain & crop on hand, both standing and housed, not exceeding, however, two thousand bushels of corn & wheat; the secretary & sideboard, bureau & couch, & sofa; clock & case; three good beds & furniture; all the necessary household & kitchen furniture; all the tables & chairs; two candle-stands & my wash-stands; one rifle and two watches, & the buggy, are now his own property. I also will & bequeath to him the following negro's: Dan and his deceased wife Violet's children; Nelson, Rufus, Alexander, Anne, & Malinda, & their present & future increase; also Betty, Mat, Caroline, & all her children & future children; also Ben & Elizabeth, & her children & future increase; Hannah is to be maintained during her life by my son Caleb. I also will him my part of the store in Dallas, being one-half; also one-half the store-lot, & buildings, & fifty acres of land, adjoining Paul Froneberger's, on the north side of the creek, for fire-wood in Dallas. I also will and bequeath to him my negro's John, Bill, & Sarah.

Item 2nd. I give unto my beloved wife, Matilda, besides what I promised in a marriage contract, four hundred dollars; a good buggy; she is to have her fire-room in the dwelling-house two
317 years after my death, and as long after as she and my son Caleb can agree; she is to have her own beds, wash-stands, bureau, trunks, candle-stand, & all she brought here.

Thirdly. I give unto my grandson, Thomas Grier, all my South-Point tract of land, except eight acres adjoining the store & including it, which eight-acre lot, with the storehouse, is to be sold. If S. W. Craig wishes to continue the store, he may do so for one or two years after my death, or divide the goods at any time within that period, & let my executors sell my part of the same, being two-thirds of the goods & debts.

I also wish my negro's and other property not willed to be sold, to wit: One-half the lots in Lincolnton, on which Simpson's shops were built; John Dillingham, who belongs to A. & E. Hoyl; also my mill tract of land.

If Fredrick Ford does not redeem his land, I also will that to be sold, & likewise the John Roberts lot in Dallas, if he does not redeem; also, all the horses, cattle, sheep, & hogs, farming-tools, household & kitchen furniture, and all my other property, of every description, not hereinbefore specifically willed, to be sold; also, all my debts to be col-
318 lected that can be; and after the just debts I owe are paid, & the legacies & bequests hereinbefore given satisfied, then all the residue of my estate to be disposed as follows, to wit, to be equally divided among the following seven surviving children of Jacob & Mary Fullenwider, deceased: Elizabeth, the wife of Dr. Miller; Fanny, wife of Austin McAfee; Sarah, wife of Monroe Forney; Roxanna Shuford, Andrew C. Fullenwider, Henry W. Fullenwider, & Eli Fullenwider, & the three children of my daughter Elizabeth S. Stowe, that is, Catharine Ratchford, Margaret M. Stowe, & William Stowe; the two children of my daughter Sarah Grier, dec'd, Mary Adams, & Thomas Grier; the five children of my son Eli Hoyl, dec'd, Sarah C. Kienan, Mary Ann Barnett, Margaret Lusk, Laban A. Hoyl, & Alfred Eli Hoyl; the five children of my daughter Margaret Tomkies, Mariah Lusk, Laban Tomkies, Tazewell Tomkies, Catherine Tomkies, & Mary Booth Tomkies; my daughters Elizabeth L. Stowe & Margaret Tomkies, & Caleb, my son—being twenty-two grandchildren & three children. It is my will and intention that, after all my debts are paid, and all the specific legacies & bequests hereinbefore mai[illegible]' are fully satisfied, that all the res-
319 idue of estate sold as before directed & reduced to cash or notes, shall be equally divided among my twenty-two grandchildren & three children before named, share & share alike. I hereby appoint Samuel S. Adams trustee to receive Elizabeth L. Stowe's part or shares above described, and hold the same separate & apart from any control of her husband, Abraham Stowe, & for the sole use & benefit of the said Elizabeth; and, if she should die before I do, I will that said shares shall be equally divided between Catherine Ratchford and Margaret M. Stowe; & at her death I will that said share be divided in like manner.

It is likewise my will that, if Catherine Ratchford should die before receiving her share as one of my twenty-two grandchildren, or should die without children, then her share & the share of her mother's share which may fall to her as above described, to go to Margaret M. Stowe' children.

It is also my will that, if William Stowe should die before he comes of age, his share, as one of my twenty-two grandchildren, shall go to Margaret M. Stowe' children.

I hereby appoint William J. T. Miller trustee for Sarah, wife
320 of Monroe Forney, to receive her share, & hold the same for her use, separate & apart from the control of her said husband.

I will and bequeath to my wife Matilda all my interest & estate in the free boy Cherry, lately bound to me by the county court of Gaston County.

I will that my executors shall pay to the church at Goshen & Dallas fifteen dollars per annum to each church for six years, as stipend for the ministers at those places, provided they be Presbyterian.

It is also my will that, if my son Caleb should die without a child or children, that the property herein willed to him shall be divided equally among my grandchildren before named living at his death & my two daughters, Elizabeth & Margaret M. Tomkies; my said two daughters, however, having three shares each & my said grandchildren having one share each.

It is my further will that, should my son Caleb die, leaving a wife,

that then she should have such part of his estate, real & personal, as the law gives to the wife of a husband dying without a will, & as tho' he was possessed of the absolute right & title to all the property hereinbefore willed to him.

321 If any of my grandchildren or children be indebted to me, or receive anything from me, it is to be deducted from the share of the one so indebted.

I also give to my son Caleb, in addition, the cotton-machine, the threshing-machine, and my iron safe, and one windmill.

I hereby nominate, constitute, and appoint my worthy friends, Winchester Pegram, William T. Shipp, & Samuel Leroy Adams trustees for my son Caleb, and I hereby will to them and their heirs the property, real & personal, hereinbefore willed to my said son, in trust for his use & benefit, during his life, and at his death to go to his children, if he should leave any; if not, to go as hereinbefore directed, & subject to the provisions hereinbefore made.

It is my *will* direction to the trustees of my son before named, that he shall be treated with liberality and indulgence; that they see that good overseers are provided for his negro's. It is my will, also, that, should he have difficulties and disagreements with his negro's, that said trustees shall sell such, & invest the proceeds in bank stock, or

322 lend the same until they can invest it in good bank stock.

It is my further will that none *other* property herein willed to my son shall be liable for any debts he may contract as security.

It is also my willt hat my son be supplied in his wants with liberality, but that he have not the right to make important trades or contracts, lest he be imposed upon or defrauded by designing persons.

I also will that, should W. Pegram & A. Morris desire to continue in the mercantile business in Dallas, they may do so for a year or two after my death, by changing the firm from A. Hoyl & Co. to C. W. Hoyl & Co.

I hereby nominate, constitute, and appoint my grandson, Thomas Grier, and W. Preston Bynum, executors of this my last will and testament, revoking all my former wills.

I*t* witness whereof, I, Andrew Hoyl, the testator, have hereunto set my hand and affixed my seal the day and year first above written.

AND. HOYL. [SEAL.]

Signed, sealed, and acknowledged in the presence of—
E. A. JENKINS, *jurat.*
W'M WEATHERS, *jurat.*

323 SATURDAY, *Feb'y* 21*st*, 1857.

This day a paper writ*t*ing, purporting to be the last will & testament of Andrew Hoyle, dec'd, was offered for probate in open court, by Thomas Grier & W. P. Bynum, executors, therein named. The execution of the said will was duly proved by the oath of Eli A. Jenkins & W'm Weathers, the witnesses *there*to said will; whereupon the said will was admitted to probate, ordered to be recorded, & the said executors were duly qualified according to law. Said will & testament is in the following words & figures to wit, as follows: (See will-book.)

STATE OF NORTH CAROLINA, *Gaston County:*

I, E. H. Withers, judge of probate of Gaston County, certify that the foregoing is a true & correct copy of the last will & testament of Andrew

Hoyle, dec'd, on file in my office, together with the entry of probate thereof made in the minute-docket at Feb'y sessions, 1857, of court of pleas and quarter sessions for Gaston County.

In testimony whereof I hereunto set my hand & affix the seal of said county this 30th day of October, 1869.

[SEAL.]

E. H. WITHERS,
Probate Judge of Gaston County.

324 *Notice.*

To THEODORE OLCOTT:

You are hereby notified to produce and file on the trial of the cause pending on the equity side of the docket in the circuit court of the United States for the district of North Carolina, wherein you are plaintiff and Robert R. Bridgers, John Bridgers, and others, are defendants, two answers written by William P. Bynum, and addressed to you, or to you and Eben S. Stephenson, in reply to a letter addressed by you and said Stephenson to said Bynum, and dated on or about the 23rd day of February, 1860, and requesting a postponement of the sale of the "High Shoals" property in the pleadings mentioned until the 1st May, 1860. Said answers written early in the month of March, 1860, or thereabouts.

You are also notified to produce and file on the trial of the said cause the original of a lease or license in writing obtained by you some time in the spring of the year 1861, from the said Bynum, touching the said
High Shoals property, and which paper is referred to by said
325 Bynum in his answer and evidence in said cause, and also referred to by you in your own deposition taken and on file in the said cause. Unless said letters and lease or license are produced on said trial, secondary evidence of the contents of the same will be offered by defendants.

BATTLES, MOORE & BRAGG,
Sol's for Def'ts, except def't Wilkes.

NOV. 11TH, 1869.

Afterwards, to wit, at rule day, on the first Monday in April, 1870, a license from W. P. Bynum, trustee, &c., to John J. Muir and T. Olcott, is filed by the complainant as evidence in the cause, which said license is in the words and figures following, to wit:

326 John J. Muir and Theodore Olcott have permission to enter upon any of the High Shoals lands not now under lease or fit for farming purposes, and to sink shafts thereupon for iron & other ores, except gold ore, raise the same in sufficient quantity to test its quality, & to make such explorations as will enable them to ascertain the correct value of the iron & other ores as aforesaid on said property.

In pursuit of the foregoing object, however, no injury or destruction is to be done to the tenants now occupying said property or the lands they cultivate, the houses and other buildings, woodlands, &c.

The examination shall be confined to iron & other ores, except gold, & they shall use such timber & other material only as will be necessary to sink shafts & raise iron & other ores as aforesaid.

The license here granted shall cease & determine on the first day of November, 1861, or at any time previous thereto. If I effect a sale of said property, or any portion thereof, I also especially reserve the
327 right to enter upon the premises above described at any time, &

put an end to the foregoing license, & resume the possession of said property.

APRIL 16TH, 1861.

W. P. BYNUM,
Trustee of H. S. Co.

328 *Deed from Groot to Bronson & Beardsley.*

This indenture, made the eight' day of April, in the year of our Lord eighteen hundred and fifty-four, between Philip W. Groot, of the city and county of Albany, in the State of New York, party of the first part, Green C. Bronson of the city and county of New York, and Samuel Beardsley, of the city of Utica and State of New York, trustees, as hereinafter mentioned, parties of the second part, and the High Shoals Mining and Manufacturing Company, a corporation formed under the laws of the said State of New York relating to the formation of mining and manufacturing corporations, party of the third part, witnesseth:

That the said party of the first part, for and in consideration of the sum of seven hundred and fifty thousand dollars to him in hand paid by the said party of the third part, the receipt whereof is hereby confessed and acknowledged, hath given, granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and doth by these presents give, grant, bargain, sell, alien, enfeoffe, convey, and confirm unto the said parties of the second part, trustees, as hereinafter mentioned, in their actual possession now being, the several tracts, pieces, and parcels of land hereinafter mentioned and described, the first of which is a
329 large tract of land situate in the counties of Gaston and Lincoln, in the State of North Carolina, commonly called the High Shoal property, bounded and described as follows, to wit:

Begin'ing at a large birch on the north bank of the south fork of the Catawba River; thence north 17° east, 46 poles, to a post-oak; thence north 83° east, 182 poles, to a red ; thence north 2° east, 141 poles, to a stone; thence north 75° west, 107 poles, to a post-oak stump—Friday's corner; thence north 56° east, 13 poles, to a chestnut; thence north 80° west, 18 poles, to stake; thence north 48° east, 75 poles, to a post-oak; thence north 63° west. 100 poles, to a red oak; thence north 29° east, 92 poles, to a black-oak—Friday's corner; thence north 64° west, 6 poles, to a red-oak; thence south 32° west, 10 poles, to a red-oak—Abram's corner; thence along his line, north 81° west, 181 poles, to a black-gum—his begin'ing corner; thence north 140 poles, to pointers; thence east 202 poles, to a post-oak—Carpenter's corner; thence north 39 west, 16 poles, to a black-oak; thence north 84 poles, to a black-gum; thence north 74° west, 114 poles, to a post-oak; thence north 16° east, 62 poles, to a post-oak—begin'ing corner of the 350-acre tract; thence north 75° west, crossing the Lincoln road, 221 poles, to point-
330 ers; thence south 16 west, 144 poles, to a white-oak near a branch; thence west 56 poles, to a rock; thence the same course 10 poles, to a stake; thence south 32° west, 100 poles, to a stake; thence north 62° west, 64 poles, to a stake; thence north 27° east, 62 poles, to a stake; thence north 70° west, 109 poles, to a black-oak; thence west, 20 poles, to a chestnut; thence south 60° west, 31 poles, to a stake; thence south 4° east, 315 poles, to a large pine—Shuford's corner; thence south 82° east, 92 poles, to a pile of rocks, near a large black-oak on a stony ridge—Shuford's corner; thence south 9° west, 53 poles, to a persimmon on bank of the south fork; thence crossing the south fork 9° west, 20 poles, to a stake on the south bank of the south

fork; thence up the river north 82° west, 58 poles, to a stake; thence south 53° west, 56 to an elm; thence north 67° west, 42 poles, to a stake; thence north 74 west, 20 poles, to a stake; thence north 65° west, 30 poles, to a stake; thence north 76° west, 12 poles, to a stake at the mouth of Beaver Dam Creek; thence up it; thence south 37° west, 42 poles, to a forked white-oak—Carpenter' corner; thence south 72° east, 165 poles, to a stake; thence north 44° west, 160 poles, recrossing said branch, to a large white-oak on the bank of said branch; thence
331 south 72° east, to a stone and pointers; thence south 66 poles to a post-oak—Daniel Carpenter's corner; thence with his line, south 50° west 49 poles, to a hickory—Carpenter's corner; thence south 23 west, 55 poles, to a dead pine—Carpenter's corner; thence with his other line south 42 west, 28 poles, to post-oak—Daniel Carpenter's corner; thence north 74° west, 78 poles, to a dead white-oak—corner of Jacob Carpenter's 30-acre tract; thence north 21 west, 54 poles, to a stake; thence south 74° west, 32 poles; thence south 48° east, 12 poles, to a stake; thence south 74° west, 65 poles, to a stake; thence south 9 poles, to a stake; thence south 82° east, 93 poles, to a stake; thence south 2 west, crossing Mountain Branch, 198 poles, to a Spanish oak—Carpenter's corner; thence south 25 west, 40 poles, to his corner, to a post-oak on Kiser's land; thence with Kiser's line, south 82° east, 16 poles, to a stake and pointers—Kiser's corner; thence south 17° west, 6 poles, to a post-oak—corner of the bounty land; thence with the line of the bounty land, south 11° west, 124 poles, to a stake—Clark's corner; thence north 89° west, 144 poles, to a pine; thence along Jacob Kiser's line, north 65° west, 144 poles, to a black-oak—his corner; thence south 24° west 78 poles, to a post-oak; thence south 75° east, 175 poles, to a stake on Mountain Branch;
332 thence south 53° east, 10 poles, to a stake; thence south 28° west, 50 poles, to a pine; thence north 59° west, 25 poles, to a sweet-gum, the begin'ing-corner of the Hayne's tract; thence along the south line of said tract north 74° west, 140 poles, to a pine, the fourth corner of Hayne's tract; thence south 37½ west, 180 poles, to a dead post-oak; thence south 78° west, 31 poles, to a Spanish oak, corner of the bounty-land; thence along the line of said land; thence south 10° west, 411 poles, to a post-oak, at Crosse's corner; thence south 18° west, 61 poles, to a black-oak; thence south 63° west, 57 poles, to a pine, now down—John Froneburger's corner; thence with his line south 7° east, poles, to a pine; thence with another of his lines south 70° east, 84 poles, to a black-gum; thence south 3° east, 100 poles, to a pine stump and a large black-oak, his corner, to Bale's tract; thence south 70° west, 58 poles, to a pine; thence south 68 poles to a stake; thence south 56° east, 28 poles, to a black-oak; thence south 13° west, 140 poles, to a stake and pointers; thence south 51° east, 218 poles, to a stake on Blackwood's old line; thence with it north 66 east, 52 poles, to a post-oak; thence south 24° east, 92 poles, to a small red-oak, his corner; thence north 66° east, 40 poles, to a white-oak, crossing a large branch; thence
333 south 2° east, 84 poles, to a white-oak; thence south 65 west, 9 poles, to a Spanish oak on the old line; thence along it, through the head of the furnace-pond, south 24° east, crossing the creek three times, 84 poles, to a dead post-oak, Blackwood's corner; thence north 24° west, 198 poles, to a stake; thence south 66° west, 112 poles, to a stake; thence north 34° west, 120 poles, to a stake; thence south 22° west, 237 poles, to a stone-pile and pointers, Deck's corner; thence south 8° west, 24 poles, to a gum; thence south 60° east, 23 poles, to a chestnut; thence south 34 west, 204 poles, to a Spanish oak; thence

south 39¾ degrees west, 85 poles, to a small post-oak, George Kiser's corner; thence south 50° east, crossing a small drain, 16 poles, to a stake and pointers, where a black-oak stood; thence south 37° west, 245 poles, to a double post-oak; thence north 37 west, 203 poles, to a black-oak; thence south 20° west, 98 poles, to a stake on Torrance's land; thence north 85° west, 104 poles, to a chestnut; thence south 22 west, 64 poles, to a stake; thence north 85° east, 25 poles, to a small white-oak, Ownan's corner; thence south 9° west, with Ownan's line, 103 poles, to a small post-oak stump and pointers on the bank of an old ore-hole; thence south 20 poles to a black-jack, near Ownan's ore-
334 bank; thence south 89° east, 104 poles, to a chestnut on the line of the 500-acre tract, John White's corner; thence south 1° west, 171 poles, to a post-oak, John White's corner; thence south 70 west, 28 poles, to a post-oak, White's corner on Ownan's line; thence south 1° west, 101 poles, to a black-jack; thence south 59° east, 42 poles, to a post-oak, Ownan's corner; thence south 3° east, 132 poles, to a large black-oak; thence north 70 degrees east, 74 poles, to a black-oak; thence north 29° west, 44 poles, to a chestnut in a hollow by the side of an old road; then north 41 east, 60 poles, to a pine, Blackwood's corner; thence north 19 west, 62 poles, to a pine on a ridge, Blackwood's corner; thence north 72 degrees east, 144 poles, to a dead pine and pointers in a glade near a small drain; thence north 61° east, 90 poles to a stake and pointers, S. M. Wilson's corner; thence south 19° east, 54 poles, to a stake, Wilson's corner; thence with his line north 62 east, 74 poles, to a black-jack, W'm McGill's corner; thence south 24 east, 83 poles, to a poplar; thence south 45 east, 4 poles, to a pine stump and pointers; thence north 54 degrees east, 8 poles, to a post-oak, corner of the 12-acre tract; thence along Abernethy's line, south 74 east, 95 poles, to point-
335 ers; thence north 14° east, 57 poles, to a black-oak on the bank of Furguson's branch; thence north 35 west, 42 poles, to a black-oak, Furguson's corner; thence north 53° east, 92 poles, to a chestnut, the begin'ing corner of the Blackwood tract; thence south 38 east, 9 poles, to a post-oak, Furguson's corner; thence north 84½ east, 172 poles, to a white-oak; thence south 49½ east, 84 poles, to a post-oak on a ridge; thence north 13° east, 117 poles, to a large gum, Blackwood's corner; thence north 5½ east, 26 poles, to a chestnut, Blackwood's corner; thence north 60 east, 14 poles, to a small black-oak, Blackwood's corner; thence south 18 east, 162 poles, to a stump; thence north 61° east, 20 poles, Mason's corner; thence with Mason's line north 12° west, 223 poles, to a chestnut, Mason's corner; thence north 81 east, 114 poles, to a post-oak; thence south 15° east, 90 poles, to a stake on Mason's line; thence north 71 east, 98 poles, to a poplar on a small branch; thence with Service's line south 18 east, 36 poles, to a post-oak; thence north 41° east, 58 poles, to a post-oak, Cronoley's corner; thence north 4° west, 71 poles, to a stake, Holland's line; thence south 72½ west, 41 poles, to a black-oak, Holland's corner; thence north 61½ west, with Holland's line 149 poles, to a stake; thence north 52½ west, 47 poles, Holland's corner; thence north 22
336 west, 77 poles, Holland's corner; thence north 88 east, 39 poles, Holland's corner; thence north 51 east, 79 poles, Holland's corner; thence north 70 east, 21 poles, Holland's corner; thence south 71 east, 52 poles, to black-oak stump and pointers; thence south 19° east, 87 poles, to a black-oak; thence north 87° east, 38 poles, to hickory, Costner's corner; thence north ½ east, 146 poles, to a dead hickory in Best's field; thence north 60 west, 34 poles, to a stake and pointers at the edge of the bottom of Long Creek; thence north 30 east, 30 poles, to a post-oak in the corner of Best's field, below the furnace; thence north

64° west, 148 poles, to a hickory on the west bank of Long Creek; thence with the meanders north 17° west, 18 poles, up the creek; thence north 18 poles; thence north 40 west, 21 poles; thence north 63 east, 30 poles; thence north 21 east, 25 poles; thence north 73 west, 18 poles, to a stake and pointers on the north bank of Long Creek, Michael Rhyne's corner formerly, now Shetty's corner; thence north 12 east, 47 poles, to a stake and pointers at the edge of the road leading from the furnace to the forge; thence north 51 east, 35 poles, to a chestnut at the edge of the road; thence north 40° east, 43 poles, to a stone and point-
337 ers on the south side of the road, near Shelty's fence; thence north 24° east, 17 poles. to a gate-post in the lane, the widow Fronebarger's; thence with her line north 62° west, 64 poles, to a pine, her corner; thence north 30° east, 142 poles, to a post-oak, her corner on the widow Ramsey's line; thence north 66° west, 47 poles, to a post-oak; thence north 9° east, 79 poles, to a hickory, the widow Ramsey's corner; thence 34½ east, 97 poles, to a black-oak, her corner; thence north 33° east, 115 poles, to a Spanish oak, on a bluff, on the south side of a branch; thence north 57° west, 141 poles, to a red-oak by a little glade; thence north 2° east, 72 poles, to a large Spanish oak, near Daniel Paysour's corner; thence with another of his lines, passing between his house and barn, north 33° east, 192 poles, to a chestnut, his and George Paysour's corner; thence north 62° west, 60 poles, to a stake, Paysour's corner; thence north 32 east, 140 poles, to a chestnut, Paysour's corner; thence south 62° east, 60 poles, to Paysour's other corner; thence north 29° east, 61 poles, to a post-oak, F. Crosses' corner; thence north 24° east, 139 poles, to a stake and pointers, Crosse's corner; thence with his line south 72° east, 134 poles, to a stake, David Costner's corner; thence north 37 poles, to his other stake cor-
338 ner; thence north 50° west, 23 poles, to a pine stump and pointers, Jacob Summey's corner; thence north 42° west, 37 poles, to a small post-oak, his and Joshua Carpenter's corner; thence north 52½° west, 174 poles, to a Spanish oak; thence north 38° east, 74 poles, crossing two branches, to a small dead black-oak, Joshua Carpenter's corner; thence south 49½° east, 58 poles, crossing a branch to a small white-oak, Carpenter's corner; thence north 31½° east, 207 poles, to a small maple at the head of a branch; thence, with Jacob Summey's line, north 64½° east, 128 poles, to a sourwood on a little branch; thence south 70° east, 72 poles, to a post-oak on the furnace road; thence south 25° east, 68 poles, to a red-oak, Summey's corner; thence south 82° east, 14 poles, to a dead post-oak in the field; thence north 59° east, 36 poles, to a stone corner; thence north 29 east, 254 poles, to the south fork, the begin'ing-corner, containing, by estimation, fourteen thousand two hundred and fifty acres, be the same more or less.

Also, one other tract of land, lying in the county of Gaston and State of North Carolina, adjoining the lands of James H. White, William Shetleys, Lawson Mauney, and others, begin'ing at a stake on the great road leading from Dallas to the furnace, and runs thence
339 north 89° west, 118 poles, to a stake on William Shulley's line; thence with his and Thomas Ramsey's line north 1° east, 105 poles, to a black-oak stump, Ramsey's corner; thence north 72° west, 16 poles, to a stake where the old hickory stood; thence north 27° east, 83 poles, to a large black-gum; thence north 32° east, with Lawson Mauney's line, 98 poles, to a white-oak, down the original begin'ing-corner of Adam Costner's tract; thence with Mauney's line south 53 east,

28 poles, to a rock and chestnut-oak, his and Valentine Costner's corner; thence with Costner's line south 42° east, 116 poles, to a stake on Ploute's line; thence with his line north 65 west, 54 poles, to a post-oak on the east side of the York Road, his corner; thence with his and Clemmon's line south 1° west, 197 poles, to the begin'ing, containing, by estimation, one hundred and seventy-nine acres, be it the same more or less.

Also, one other tract of land, lying in the said county of Lincoln, known as the "Gold Mine lot," on the waters of Michael's Creek; begin'ing at a black-oak on the east side of the Tucheeseegee Ford road, at the corner of Bolin T. Kirby's fence, and runs thence with line of the Gold Mine tract south 30° west, 229 poles, to a white-oak stump and
340 pointers; thence south 76° east, crossing a small branch, 39 poles, to a post-oak, Isaac Chambers' corner; thence with his line north 22° east, 42 poles, to a hickory, Clanton's corner; thence north 81° east, 32 poles, to a post-oak on the south side of Vestall's Ford road; thence with another of his lines north 5° west, 22 poles, to a small black-oak on the south side of said road, Clanton's & Kirby's corner; thence on the same course 47½ poles, to a black-oak, Kirby's corner; thence with another of his lines along the road north 5° east, 50 poles, to the begin'ing, containing, by estimation, forty-four and a half acres, be it the same more or less.

Also, one other tract, lying in the county of Cleveland and State of North Carolina, known as the Lime Quarry, furnishing lime to the Columbia furnace, adjoining the lands of James B. Falls, Benjamin F. Briggs, & others, containing about four hundred acres, be it the same more or less, and also all the other lands which were conveyed, or intended to be conveyed, to the said party of the first part by the High Shoals Manufacturing Company, a corporation created by the legislature of North Carolina by deed bearing date the 24th (twenty-fourth) day of February last, registered and recorded in the said counties of Gaston &
341 Lincoln, reference to which said deed and the record thereof is hereby had and made, together with all and singular the mines, mineral, ores, manufactories, furnaces, mills, building, machinery, and other things on or in any way appertaining to said property, and all and singular the hereditaments and appurtenances to the said several parcels land belonging or in anywise appertaining, and all the tools, implements machinery, machines, and other property now on the said premises, or in any way connected with the use of the same; subject, nevertheless, to a mortgage on the said property, executed by the said party of the first part on the twenty-fourth day of February last, to Andrew Hoyle, of Gaston, in the State of North Carolina, for securing the payment of fifty thousand dollars with interest.

To have and to hold the said several pieces, parcels, and tracts of land, and other property, with the hereditaments and appurtenances, subject to the said mortgage to the said parties of the second part, in joint tenancy, and not as tenants in common, and to the survivor, or longest liver of them, and to his heirs and assigns forever. In trust, nevertheless, and upon the trust and confidence following, that is to say, to
342 suffer and permit the said party of the third part, from whom the consideration proceeds, and its successors, officers, agents, and servants, to enter into possession and enjoy the said property and every part and parcel thereof, and to take and receive to its own use, benefit, and behoof, all and singular the rents, issues, profits, and income, thereof, and upon the further trust and confidence, upon the reasonable

request, in writing, of the said party of the third part, to grant and convey the said property, and every part and parcel thereof, in fee to the said party of the third part, or to such person or persons *of* the said party of the third part shall or may agree to sell and transfer the same, and in case of death of either of the said parties of the second part, before the said trust shall be completely executed, then upon the further trust, that the said survivor will, upon the reasonable request *of*, in writing, of the said party of the third part, grant and convey the said property, and every part and parcel thereof, to such person as the said party of the third part shall designate for that purpose, to be held by such person, together with the said survivor, in joint tenancy upon the like terms, trusts, and confidence as are herein declared.

343 And the said parties of the second part hereby accept the said trusts, and each for himself covenants and agrees to and with the said party of the third part faithfully to execute and perform the same, at the costs, charges, and expense of the said party of the third part, which the said party of the third part hereby covenants and agrees to and with the said trustees, and each of them, to bear, sustain, and pay. And the said party of the third part also covenants and agrees to and with the said trustees, and each of them, to *e*ndemnify and save them and each of them harmless and discharged of, from, and against all damage, costs, charges, and expenses which they, or either of them, may sustain or be put to in consequence of accepting or in executing the said trust, except such damages, costs, and *damages* as the said trustees may sustain or be put to in consequence of their culpable misconduct in the premises. And the said party of the first part for himself, his heirs, and personal representitives, does hereby covenant and agree to and with the said parties of the second, their heirs and assigns, and to and with the said party of the third part, its successor & assigns, that the said party of the first now is seized of a good,

344 sure, and indefeas*a*ble estate in fee-simple absolute, of and in all and singular the lands, ten*a*ments and hereditaments above mentioned, and every part and parcel thereof, and has good right and lawful authority to grant and convey, the same in manner aforesaid, and that the said premises and every part and parcel thereof are free, clear, and discharged of and from all debts, burdens, liens, charges, judgements, mortgages, and other encumberances whatsoever, saving and excepting the mortgage to said Andrew Hoyle, hereinbefore mentioned, and that the said parties of the second and third parts, their successors and assigns, shall peaceably and quietly possess, hold, and enjoy the said property and every part and parcel thereof, against all and every person and persons lawfully claiming or to claim the same or any part thereof; and further, that he, the said party of the first, his heirs and personal representatives, will, upon request, make, and execute all such further and other conveyances and assurances as may be necessary or proper for the purposes of vesting the said property, and every part and parcel thereof in the said parties of

345 the second and third parts, their heirs, successors, and assigns forever, in fee-simple; and further, the said property and every part and parcel thereof in the quiet and peaceable possession and enjoyment of the said parties of the second and third parts, their heirs, successors, and assigns, he, the said party of the first part, and his heirs, will forever warrent and defend.

In witness whereof the said parties of the first and second parts have hereunto affixed their hands and seals, and the said party of the third

part has affixed his corporate seal and the name of its president and secretary, the day and year first above written.

PHILIP W. GROOT, [SEAL.]
GREEN C. BRONSON, [SEAL.]
SAMUEL BEARDSLEY, [SEAL.]

HIGH SHOALS M. & M. COMPANY.

GREEN C. BRONSON,
Prest. High Shoals Company.
PHILIP W. GROOT, *Sect.*

Witness:
SYLVESTER LAY.
WASH. R. NICKOLS.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that, on the eight' day of April, A. D. one thousand eight hundred and fifty-four, before me, Sylvester Lay, a commis-
346 sioner within said State of New York, appointed by the governor of the State of North Carolina to take the proof or acknowledgement of deeds or any other writing under seal, to be used or recorded in said State of North Carolina; personally appeared, Philip W. Groot Green C. Bronson, and Samuel Beardsley, who severally acknowledged to me that they executed the foregoing instrument, for the purposes therein expressed; and at the same time, before me personally appeared, Green C. Bronson, president, and Philip W. Groot, secretary, of the High Shoals Mining and Manufacturing Company, and they severally acknowledged the signing and sealing of the said instrument to be the voluntary act and deed of said company, and the said Green C. Bronson, president of the said company, being by me duly sworn, did depose and say that he resides in the city of New York; that the seal affixed to the said instrument is the corporate seal of said company, and was affixed thereto by authority of said Company, and that he, and said secretary, respectively subscribed and executed said instrument, by like authority.

In witness whereof I have hereunto set my hand, and affixed my
347 official seal, the eight' day of April, A. D. one thousand eight hundred and fifty-four.

SYLVESTER LAY, NEW YORK. COMMISSIONER.

SYLVESTER LAY,
Commissioner for the State of North Carolina,
18 *Wall St., New York.*

STATE OF NORTH CAROLINA,
Lincoln County:

I certify that the foregoing is a true copy from the register's office of Lincoln County, which may be found in book No. 42, page 430 to 437.

J. T. ALEXANDER, *Register.*

Lincoln County, North Carolina, 19th February, A. D. 1855.

348 This indenture, made this the 12th day of June, A. D. 1868, by and between William P. Bynum and Thomas Grier, executors of the last will and testiment of Andrew Hoyl, deceased, and as attorney under a power contained in a deed from A. E. Hovey, to them, hereafter more particularly set forth, of the one part, and William Sloan, of Gaston County, in North Carolina, of the other part:

Whereas the said Andrew Hoyl, in his lifetime, professing to act as

president of the corporation known and chartered as the High Shoal Manufacturing Company, on the 24th day of February, 1854, to one Philip Groot, in fee, a deed for all that real and personal property known as the High Shoal property, situated in the counties of Gaston, Lincoln, and Cleaveland, the boundaries whereof are therein specially described and set forth;

And whereas, by a trust deed in the nature of a mortgage, the said Groot on the same day reconveyed the premises to the said Andrew Hoyl in fee, to secure the payment of a certain sum of money therein mentioned;

And whereas the said Groot did not pay said money accord-
349 ing to the terms of said deed in trust, nor in the lifetime of said Hoyl;

And whereas the said Hoyl have died and left a will, and constituted the said Bynum and Grier executors thereof, who qualified as such, and by said will directed, after notification, specified divers as bequest', then all the balance of his property shall be sold by the said executors;

And whereas, after default by said Groot as aforesaid, the said Bynum and Grier, *a will* by virtue of their said office of executors, as by power contained in said trust-deed to the said Hoyl, his executors so to sell, did sell said premises on the 1st day of January, 1859, to said A. E. Hovy, by deed in fee, and on the same day received from said Hovey a trust-deed in the nature of a mortgage, to secure the payment of $40,000, and containing a power, in case of default in payment to said Bynum and Grier, to enter upon and sell said premises;

And whereas the said Hovey made default in payment, and the said Bynum and Grier, on the 28th of April, 1860, exposed said premises for sale according to the terms of said trust-deed, when the said William Sloan, as agent for the said corporation, became the highest bidder, at the price of about $45,000;

350 And whereas no deed has been made to said Sloan:

Now, therefore, this indenture witnesseth that for and in consideration of the premises, and of one dollar to the said Bynum and Grier in hand paid by the said Sloan, they, the said Bynum and Grier, do hereby bargain, sell, and convey to the said Sloan, all that property, real and personal, known as the High Shoal property, situated in the counties of Gaston, Lincoln, and Cleaveland; the metes and bounds whereof are particularly described and set forth in said deed from Hoyl, as president, to said Groot, registered in Gaston County, in book No. 1, pages 696 to 702; also in Lincoln County, book No. 42, pages 387 to 391; to which reference hereby made for the ascertainment thereof.

To have and to hold the aforesaid premises to the said Sloan, his heirs and assigns, in trust for the use and benefit, and subject to the disposition and control, of the said company.

In witness whereof we have hereto set our hands and seals this the date above written.

W. P. BYNUM, *Ex.* [SEAL.]
THOMAS GRIER, *Ex'r.* [SEAL.]

351 STATE OF NORTH CAROLINA:

Personally appeared before me, R. M. Pearson, one of the judges of the supreme court of North Carolina, W. P. Bynum and Thomas Grier, who are personally known to me, and duly acknowledged their signa-

ture to the within deed, for the true purpose therein contained; therefore let it, with this certificate, be registered in the proper office.

Done at Raleigh this the 13th day of June, 1868.

R. M. PEARSON, *J. S. C.*

STATE OF NORTH CAROLINA, *Lincoln County:*

The within deed, with the certificate thereon, was duly registered in the register's office in Lincolnton, in book No. 45, pages 269 & 270, on the 11th day of August, A. D, 1868.

THOMAS W. ROBINSON, *Reg'r.*
JOHN D. SHAW, *Dep'ty.*

STATE OF NORTH CAROLINA, *Gaston County:*

The within deed, with certificate thereon, was duly registered in the register's office for said county, in book No. 3, page 644, November 9th, A. D. 1868.

CYRUS C. WITHERS,
Register.

352 STATE OF NORTH CAROLINA, *Gaston County:*

I hereby certify that this is a true copy of a deed registered in this office, in book No. 3, page 644, November the 9th, A. D. 1868.

CYRUS C. WITHERS,
Register.

353 Pursuant to previous notice to that effect, a general meeting of the stockholders of the High Shoals Manufacturing Company was held at Charlotte, North Carolina, on the thirtieth day of October, 1867, present the following stockholders, to wit: Caleb Phifer, by his proxy; R. W. Allison, William F. Phifer, William Sloan, W. P. Bynum for himself; W. P. Bynum & Thomas Grier, executors of Andrew Hoyl; R. R. Bridgers, & B. B. Barron, & J. L. Bridgers, by their proxy, representing more than two-thirds of the stock of said company.

On motion, R. W. Allison was appointed chairman of the meeting, & Thomas Grier was appointed secretary.

An election was held for five directors of the corporation for one year from this date, & until their successors are duly elected, when the following stockholders were unanimously elected, viz: W. P. Bynum, Thomas Grier, J. L. Bridgers, R. W. Allison, & William Sloan. Thomas Grier was elected secretary.

354 On motion, it was unanimously resolved that—

Whereas, by a previous resolution of the stockholders & directors of the company, A. Hoyl, the president thereof, was directed to convey the real estate of said company, known as the "High Shoals" property, to P. W, Groot, for the sum of seventy thousand dollars, taking such security for the said sum as he should deem satisfactory;

And whereas said A. Hoyl did sell and convey to P. W. Groot the said property, by deed bearing date the 24th day of February, 1854, and did, on the same day, take from the said P. W. Groot a mortgage of said property to himself, in trust for the said company, to secure the purchase-money, which said mortgage empowered and directed him or his executors & assigns to sell the said property, as therein specified, on failure of said mortgage to pay the said purchase-money as stipulated;

And whereas said P. W. Groot did fail to make the payments as stipulated, and A. Hoyl died before entry and sale, leaving W. P.

Bynum and Thomas Grier his executors under his will, who duly proved said will & undertook the burdens thereof;

And whereas the said P. W. Groot did wholly fail & neglect to
355 pay the said purchase-money as stipulated in said mortgage, whereupon it became the duty of said Bynum & Grier, executors of said A. Hoyl, late president of said company, to enter on the premises and sell the same;

And whereas the said Bynum & Grier did enter & sell the same at public auction, after due notice, according to the powers & terms of said mortgage, on the first day of January, 1859, when and where A. E. Hovey became the purchaser, as the last & highest bidder, at the sum of forty thousand dollars, which was the amount of the unpaid purchase-money due on said mortgage & bond of said P. W. Groot, which said sum was endorsed as received by the said High Shoals Manufacturing Company on said mortgage & bond of said P. W. Groot, and said bond & mortgage were then delivered up and cancelled;

And whereas said Bynum & Grier, for & in behalf of said company, executed and delivered to the said A. E. Hovey a deed in fee-simple for the said property, at the same time taking a mortgage to them, in trust for the said company, for the said sum of forty thousand dollars, the amount of the bid of the said A. E. Hovey, the purchaser, by
356 the assent and direction of said company;

And whereas the said A. E. Hovey made default in paying said purchase-money, whereby it became the duty of the said Bynum & Grier, executors & trustees as aforesaid, by the terms of said mortgage, to enter & sell said premises; And whereas they did enter and sell the same, at public auction, after due notice, and according to the terms of the said mortgage, on the 28th day of April, 1860, when and where William Sloan became the purchaser, at the sum of $43,200, being the last & highest bid for the same;

And whereas the said William Sloan, by the direction of the said company, in general meeting of the stockholders, did bid off & purchase said property for & in behalf of said company, as their agent, in order to save said debt;

And whereas, by the unanimous order & direction of said company, in general meeting, W. P. Bynum & Thomas Grier, executors & trustees as aforesaid, were duly empowered & directed to sell said property for a sum not less than the said sum of $43,200;

And whereas the said Bynum & Grier did, on the day of
357 , 1862, *did* agree & contract with R. R. & J. L. Bridgers to sell said High Shoals property to them for the sum of sixty-five thousand dollars, according to a written contract made with the said R. R. Bridgers & John L. Bridgers;

And whereas the records of the said transactions, as kept by the said company, have been lost or destroyed during the late war, as also the records of the proceedings of the several meetings of the said company, had from time to time, from 1864 until the present time, as the exigenc'es of the company *regained*. Therefore,

Be it resolved by the said company, and it is hereby unanimously resolved by the stockholders of said company, That the several transactions hereinbefore enumerated, to wit, the several sales and subsequent proceedings connected therewith, had and made by A. Hoyl, late president of said company, and by W. P. Bynum & Thomas Grier, executors, trustees, & agents of said company, as hereinbefore set forth, be, and the same are, in all things ratified & confirmed, as the acts & deeds of the High Shoals Manufacturing Company.

Be it further resolved, and it is hereby ordered & directed, That
358 W. P. Bynum, president of said company, make and execute, according to the act of the assembly in such case made and provided, touching deeds of land made by corporations, a deed or deeds, or other writings, for said "High Shoals" property, to R. R. & J. L. Bridgers, & their associates & assigns, according to the said agreement made with them by said Bynum & Grier, for the sale of said property, upon their complying with the terms of said agreement.

Be it further ordered, That all by-laws & other resolutions inconsistent with these resolutions & orders be, and the same are hereby, repealed.

W. P. BYNUM, *Pres't.*

THO'S GRIER, *Sec't'y.*

The foregoing transcript, upon two sheets of paper, & containing six pages, is a full, true, & perfect transcript from the journals of the stockholders of the High Shoals Manufacturing Company, copied & certified this 20th January, 1869.

W. P. BYNUM, *Pres't.* [SEAL.]

THO'S GRIER, *Sec't'y.*

359 Extract from journals of High Shoals Manufacturing Company, at a meeting of the stockholders held in Charlotte, Jan. 20th, 1869.

Resolved further, That until further orders, the private seal of the president of the company shall be the corporate seal of said company, and that all deeds & instruments of writing of said company requiring the seal of the corporation to give them validity shall be signed by the president, as president, and his own seal affixed thereto, and the same shall then in all respects be deemed, held, and taken to be the corporate seal of the company.

Resolved further, That all copies & transcripts from the books of the proceedings of said company shall be signed by the president of the company, and sealed as aforesaid, and countersigned by the secretary, and when thus verified, the same shall be of the same authenticity as the originals.

A true copy. Jan. 21st 1869.

W. P. BYNUM, *Pres't.* [SEAL.]

THO'S GRIER, *Sec't'y.*

360 Extract of a meeting of the directors of the High Shoals Manufacturing Company, held in Charlotte, N. C., Jan. 20th, 1869.

A vote was then taken for president of the company from this day until the first Tuesday of January, 1870, and until a successor is regularly elected and inducted into office, when W. P. Bynum was put in nomination and unanimously re-elected.

Thomas Grier was unanimously re-elected secretary for the same term.

A true copy. Jan. 21st, 1869.

W. P. BYNUM, *Pres't.* [SEAL.]

THOMAS GRIER, *Sec't'y.*

361 HIGH SHOALS, *January 18th*, 1854.

At an adjourned meeting of the stockholders of the High Shoals Manufacturing Company, held at the High Shoals, on the 18th Jan., 1854—present, Andrew Hoyl, W'm E. Rose, Daniel Hoffman, Daniel

Hines, James F. White, John R. Falls, John Falls, Aaron Jenkins, and L. E. Thompson—the said stockholders being more than one-half of the whole stock of the said company;

And it appearing that all the stockholders of the said corporation have heretofore covenanted & agreed, each one for himself, & not one for another, by deed duly executed and delivered, to & with the said L. E. Thompson, of Lincoln County, to bargain, sell, convey, transfer, and assign in fee-simple, to the said L. E. Thompson, his heirs & assigns, for the purpose of enabling him to dispose of the same, all his and their right, title, interest, claim, & demand of, in, & to all his & their lands, with the appurtenances, known as the High Shoals tract or tracts, and belonging to the said High Shoals Manufacturing Company, whenever the said L. E. Thompson, or his assigns, should pay, or cause to
362 be paid, to the stockholders of said corporation, the sum of seventy thousand dollars, with interest thereon from & after the 1st day of July, 1853;

And whereas the said L. E. Thompson, having contracted to sell & convey all the said lands, with their appurtenances, to P. W. Groot, esq., of the city of New York, for the said sum of money; and it being the desire and intention of the said corporation to carry into effect the aforesaid covenants & agreements, made by the said stockholders;

It is therefore ordered & directed that Andrew Hoyl, esq., president of the said corporation, do execute & deliver to the said P. W. Groot, esq., all such deed or deeds, or other writings as may be deemed necessary & proper to vest the legal title of & for the said lands, with the appurtenances, in the said P. W. Groot, his heirs & assigns, whenever the said P. W. Groot shall pay the said sum of money, to wit, the sum of seventy thousand dollars, ($70,000 00,) with legal interest thereon from the said 1st day of July, 1853, until paid, or shall secure the payment of the same, in such manner as shall be satisfactory to the said Andrew Hoyl.

363 The above transcript of two pages is a true and perfect copy of the proceedings of the stockholders of the High Shoals Manufacturing Company, as they appear upon the journals of the company.

A true copy. Jan. 21st, 1869.

W. P. BYNUM, *Pres't.* [SEAL.]

THOMAS GRIER, *Sec't'y.*

Extract from the journals of the meetings of the directors of the High Shoals Manufacturing Company, viz.:

HIGH SHOALS, *Jan. 18th*, 1854.

It is therefore ordered & directed that Andrew Hoyle, esq., president of the said corporation, do execute and deliver to the said P. W. Groot, esq., all deed or deeds, or other writings, as may be deemed necessary & proper to vest the legal title of & for the said lands, with the appurtenances, in the said P. W. Groot, his heirs & assigns, whenever the said P. W. Groot shall pay the said sum of money, to wit, the sum of seventy thousand dollars ($70,000 00,) with interest thereon from the said first day of July, 1853, until paid, or shall secure the
364 payment of the same in such manner as shall be satisfactory to the said Andrew Hoyl.

A true copy. January 21st, 1869.

W. P. BYNUM, *Pres't.* [SEAL.]

THOMAS GRIER, *Secretary.*

365 Afterwards, to wit, at rule day, on the first Monday in May, 1870, on motion by complainant's counsel, this cause is set down for hearing.

And at June term, 1870, an agreement in writing of the counsel of the respective parties is filed, in the words and figures following, to wit:

366 In circuit court of United States, district of North Carolina.

THEODORE OLCOTT
vs.
CHARLES WILKES & OTHERS.

In this case it is admitted that the deed of William P. Bynum and Thomas Greer to Aaron E. Hovey, dated January 1st, 1859, was executed with proper seals by the bargainors. Also that the order of probate and registration on the copy of the deed from Aaron E. Hovey to Theodore Olcott and Eben S. Stephenson, dated the 8th of January, 1859, was made by a person who was a judge of probate, duly appointed as such by the laws of the State, reserving to defendants nevertheless, all right of exception to the validity, in law, of such probate and registration of a copy of said alleged deed.

W. A. GRAHAM,
Pl'ff's Att'y.
THOMAS BRAGG,
Att'y for Defendant.

367 And further day is given to the parties.

And afterwards, to wit, on the 24th day of October, 1870, a further prosecution bond is filed in this cause, which is in the words and figures fallowing, to wit:

368 Circuit court of the United States, district of North Carolina.

Know all men by these presents that we, Theodore Olcott, of the city & county of Albany, in the State of New York, and John G. Williams, of Raleigh, in the State of North Carolina, are held and firmly bound to William P. Bynum, and Thomas Grier, A. E. Hovey, William Sloan, Charles Wilkes, R. R. Bridgers, John L. Bridgers, in his own right and as executor of Powell, dec'd, and B. Barron, in the penal sum of three hundred dollars; for the payment of which, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, sealed with our seals and dated this 24th day of October, 1870.

The conditions of this obligation *is* such, that whereas the above-bounden Theodore Olcott and Eben Stephenson have instituted a suit in equity in the circuit court of the United States for the district of North Carolina, as plaintiffs, against the above-named obligees, as defendants: Now, if the said plaintiffs shall prosecute their said suit and shall pay all such costs and damages as may be awarded against
369 them therein, then the said obligation to be void; otherwise to remain in full force and virtue.

[SEAL.]
JNO. G. WILLIAMS. [SEAL.]

370 And afterwards, to wit, at a rule day, on first Monday of May, 1870, on motion of the plaintiff's counsel, it is ordered that this cause be set down for hearing.

371 And afterwards, to wit, at November term, 1870, of the said court, this cause coming on to be heard upon the bill of complaint, the answers of the defendants, the exhibits and proof filed, and being debated by counsel on both sides:

It is ordered, adjudged, and decreed by the court, that the said bill be dismissed, with costs against the complainant, to be taxed by the clerk of this court.

From this decree the plaintiff prays an appeal to the Supreme Court of the United States, which is allowed; and he enters into bond, with surety, in the words and figures following, to wit:

372 Know all men by these presents that we, Theodore Olcott & John G. Williams are held and firmly bound to Charles Wilkes, Robert R. Bridgers, B. B. Barron, John L. Bridgers, in his own right and as executor of Powell, dec'd; William P. Bynum & Thomas Grier, trustees; William Sloan & Aaron E. Hovey, in the penal sum of three hundred dollars, to be paid to them, their executors & administrators, sealed with our seals, & dated this 16th day of December, 1870.

The condition of this obligation is such that, whereas in a certain suit in equity, in the circuit court of the United States for the district of North Carolina, in which the said Theodore Olcott is plaintiff, and the aforesaid obligees are defendants, a decree has been rendered against the said plaintiff, from which he has prayed & been allowed an appeal to the Supreme Court of the United States: Now, if the said plaintiff, Theodore Olcott, shall pay all costs which may be awarded against him in said Supreme Court, in case of his failure to prosecute the said appeal with effect, then this obligation to be void; otherwise to remain in full force and virtue.

T. OLCOTT. [SEAL.]
JOHN G. WILLIAMS. [SEAL.]

N. J. RIDDICK, *Clerk.*

373 In the circuit court of the United States for the district of North Carolina.

THEODORE OLCOTT
v.
CHARLES WILKES & OTHERS. } In equity.

Upon the hearing of this cause, the plaintiff's counsel offered to read in evidence the copy of the alleged deed from Aaron E. Hovey to the plaintiff, Theodore Olcott and Eben S. Stephenson, dated January the 8th, 1859, filed with the evidence in this cause. The defendants' counsel objected, upon the ground that the said deed had not been duly proved and registered, as required by law; and the objection was sustained by the court. To this ruling of the court the plaintiff's counsel excepted.

And the court being of the opinion that, without probate and registration of said deed, the suit of the plaintiff could not be maintained, adjudged and decreed that said bill should be dismissed at the costs

of the plaintiff. To which the plaintiff excepted, and prayed an appeal to the Supreme Court of the United States.

G. W. BROOKS,
Dist. Judge.

374 Circuit court of the United States, in and for the district of North Carolina, to wit:

I, N. J. Riddick, clerk of the said court, do hereby certify the above and foregoing to be a true exemplification of the record of the cause of Theodore Olcott, complainant, and Charles Wilkes, Robert R. Bridgers, B B. Barron, John L. Bridgers, in his own right and as executor, &c., of Powell; William P. Bynum, and Thomas Grier, executors and trustees of Andrew Hoyl, deceased; William Sloan and Aaron E. Hovey, defendants, containing the original bill, the answers of the said defendants, the subpœnas issued in the cause, the testimony taken and filed, the exhibits filed by the complainant, the exhibits filed by the defendants, the interlocutory orders, and the final decree in the cause, together with the bill of exceptions.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court of the United States, at the city of Raleigh, the fourteenth day of September, in the year of our Lord one thousand eight and seventy-one.

[SEAL.] N. J. RIDDICK, *Clerk.*

(Indorsement on cover:) No. 344. Theodore Olcott, appellant, vs. Charles Wilkes, Robert R. Bridgers, B. B. Barron, John L. Bridgers, in his own right and as executor of Powell, dec'd; William P. Bynum & Thomas Grier, trustees, &c.; William Sloan and Aaron E. Hovey. N. Carolina C. C. U. S. Filed 9th October, 1871.

IN THE

Supreme Court of the United States.

IN EQUITY.—No. 119.

THEODORE OLCOTT

against

CHARLES WILKES and others.

Plaintiff's Brief.

W. A. GRAHAM,
Solicitor and Counsel for Plaintiff.

Pearson, Printer, corner 9th & D sts., Washington, D. C.

IN THE

Supreme Court of the United States.

THEODORE OLCOTT
vs.
CHARLES WILKES AND OTHERS. } IN EQUITY. No. 119.

The plaintiff submits as follows:

This is an application by a mortgagor offering and praying to be allowed to redeem the mortgaged estate, on payment of the debt and interest, alleging that there has been an attempt to foreclose by a sale which is charged to have been irregular and void, and that the estate has been subsequently agreed to be transferred to two successive purchasers, one of whom is now in possession, and both of whom had notice of defect of title by reason of the irregularity complained of.

It is resisted on the ground that the sale in question was a valid sale, and operated to foreclose and to bar the equity of redemption, admitting that subsequent sales were agreed to be made, as alleged, but denying actual notice of defect in the title on the part of the purchasers.

ABSTRACT.

The bill, filed April 2d, 1868, alleges that on the 1st day of January, 1859, in fulfillment of a contract entered into on the 28th December preceding, the defendants Bynum & Grier, by their deed of conveyance, did trans-

fer to the defendant Aaron E. Hovey in fee simple absolute, an extensive real estate situate in the counties of Lincoln, Gaston, and Cleveland, in North Carolina, on the south fork of the Catawba river, known as "The High Shoal" property, and other lands, embracing in the whole fourteen thousand eight hundred and seventy-three acres, or thereabouts, abounding in iron ore and other minerals, and having erected thereon machinery and other fixtures for the manufacture of iron, of a value greatly exceeding the sum of two thousand dollars, for and in consideration of the sum of forty-eight thousand five hundred dollars, of which eight thousand five hundred dollars was paid down; and that as to the balance of forty thousand dollars the said Hovey, on the same day, executed and delivered a mortgage in the form of a deed in trust, reconveying all the aforesaid real estate to the said Bynum & Grier in fee simple, "in trust for the better securing of the said sum of forty thousand dollars," in the following manner, to wit: thirteen thousand three hundred and thirty-three dollars and thirty-three cents on the first day of January, 1860, with interest thereon at six per centum per annum from the first day of January, 1859; the second instalment of the same amount on the first day of July, 1860, with interest thereon as aforesaid; the last instalment of the same amount on the first day of January, 1861, with interest thereon as aforesaid, a bond or obligation being given by said Hovey with conditions to the same effect, with a provision in said deed in trust as follows, to wit: "And the said party 'of the first part, (Hovey,) for himself, his heirs, executors, 'and administrators, does covenant and agree to pay unto 'the said party of the second part, (Bynum & Grier,) their 'executors, administrators, or assigns, the said sum of 'money ($40,000) and interest as above expressed in the 'condition of the said bond; and if default shall be made 'in the payment of the said sum of money, above-men-'tioned, or the interest that may grow due thereon, or

'any part thereof, that then and upon the failure of the 'party of the first part to pay the first or any subsequent 'instalment, as hereinbefore specified, it shall be lawful 'for the said party of the second part, or either of them, 'their executors, or administrators, or assigns, to enter 'in and upon all and singular the premises hereby grant-'ed or intended to be, and to sell and dispose of the 'same, and all benefits and equity of redemption of the 'said party of the first part, his heirs, executors, admin-'istrators, or assigns, therein at public auction, according 'to the act in such cases made and provided; and as the 'attorney of the first part, for that purpose duly author-'ized, constituted, and appointed, to make and deliver to 'the purchaser or purchasers thereof a good and sufficient 'deed or deeds of conveyance in law for the same in fee 'simple, and, out of the money arising from such sale, to 'retain the principal and interest which shall then be due 'on the said bond or obligation, together with the costs 'and charges of advertising and sale of the same premises, 'rendering the overplus of the purchase money, if any 'there shall be, unto the said party of the first part, his 'heirs, administrators, or assigns, &c."—(See deed appended to bill as part thereof, pp. 18, 19.)

That, although in the form of the conveyance, the foregoing was a transaction between the said Bynum & Grier on the one part and the said Hovey on the other, the latter had no beneficial interest in the same, but received the title and executed the bond and mortgage as aforesaid solely as a trustee, and for the benefit and behoof of the plaintiff, Theodore Olcott, and one Eben S. Stephenson, in pursuance of an agreement made between the latter and the said Bynum & Grier, as aforesaid, on the 28th of December, 1858; that the said Hovey was a person of no estate, and neither paid, nor was expected to pay, any part of the consideration for said property, but the plaintiff and the said Stephenson made the purchase of the same, paid the sum of eight thousand five hundred dollars

in part at that time, and made the arrangement for, and the stipulation of, said mortgage deed for securing the balance of forty thousand dollars; being the only purchasers in interest.

That the property in question had once belonged to "The High Shoal Manufacturing Company," a corporation chartered by an act of the General Assembly of North Carolina; and by a conveyance dated the 24th of February, 1854, had been transferred by said company to one Philip W. Groot, of the State of New York, in fee simple, for a consideration recited therein of $75,000; and on the same day the said Groot mortgaged the same in fee simple by a deed in trust to Andrew Hoyle, as trustee, to secure the payment of the sum of $50,000, a balance of the purchase money not then paid, with power to enter and sell in the event of the non-payment of the same by the 1st of September, 1855.

That the said Hoyle having died, leaving a last will and testament in writing, of which the said William P. Bynum and Thomas Grier were nominated executors, and proved the same, and took upon themselves the administration of his estate and the powers conferred by said deed of mortgage, and a balance remaining due thereon of $48,500.00, or thereabouts, they, in order to satisfy the same, by virtue of the powers conferred by the said mortgage deed and the said last will and testament, sold the said property to the plaintiff and the aforesaid Eben S. Stephenson, as aforesaid, for the said sum of $48,500.00, on the 28th of December, 1858; that the sum of $8,500.00 was paid down, and to secure the balance of $40,000.00 a mortgage by deed in trust in fee simple was made and delivered to said Bynum & Grier as trustees, bearing date January 1st, 1859, with power to enter and sell in case of the non-payment of this sum in instalments as above set forth. That the formal instruments for the fulfillment of this contract were received and made in the name of Aaron E. Hovey, as

aforesaid, as if he were the purchaser and mortgagee, yet the plaintiff and the said Stephenson were the only purchasers in interest, the said Hovey having no beneficial interest, and that this was well known to the said Bynum & Grier, who made this contract directly with them; that to carry out this arrangment the property, after advertisement, was exposed at an auction sale, and knocked down to the said Hovey, as the highest bidder, at the sum of $40,000.00, but in the whole affair he was but the agent and representative of the plaintiff and said Stephenson.

Further to show that the purchase of said Hovey was not made on his own account, or as an absolute purchase at an auction sale, but in pursuance of the arrangement aforesaid, the bill alleges that on the 3d of January, 1859, the said Hovey, in further compliance with said arrangement, executed and delivered another deed in trust to said Bynum & Grier of the same property, dated the 3d day of January, 1859, to indemnify them and the stockholders of the aforesaid High Shoal Manufacturing Company against loss or damage on account of their having sold certain negro slaves, under and by virtue of the deed in trust aforesaid executed by the said Groot, of which the title had been disputed, and likewise against all damage or loss from a suit at law then pending concerning the said property.

That, in order to divest the stockholders of the said "The High Shoal Manufacturing Company" of all further interest in the said property, and to transfer it completely to the plaintiff and Stephenson, the certificates of stock of the several stockholders in said company were passed to them also and taken into their possession, by means whereof they acquired the control of said corporation, and by *non user* of its franchises for the two following years it ceased to exist on the first of January, 1861, by the force and effect of a statute of North Carolina in such cases provided.

That, on the 8th day of January, 1859, the said Hovey, by his deed of that date, conveyed all his interest in the property aforesaid to the plaintiff and said Stephenson. (The original of this deed is lost or destroyed, but a copy is produced and proved.) That the plaintiff and said Stephenson were immediately let into possession of said property by their agent, Thomas Darling, the aforesaid Hovey (who had been a subaltern *employee* of "The New York Mining and Manufacturing Company," which had possessed the said property under the title of the said Groot while it continued) with his wife remaining there as housekeepers for the said Darling.

That the said Stephenson, for a valuable consideration, released and conveyed all his interest in the said property to the plaintiff, by his deed, duly executed and delivered, on the 18th of December, 1867, and departed this life intestate, at his residence in the State of Connecticut, in May, 1868.

That the first instalment of one-third of $40,000, secured by the mortgage aforesaid, becoming due on the 1st day of January, 1860, and being unpaid, the said Bynum & Grier, early in that year, advertised the whole of said property to be sold under the mortgage deed aforesaid, dated the 1st January, 1859; and on the 28th of April, 1860, exposed at public auction, for cash, on the premises, the entire estate aforesaid; and it was knocked down to the defendant, William Sloan, as the agent of the said trustees, who desired to reinvest themselves with the title at some nominal amount; but no money was paid, nor any title, nor contract to make title, executed by them; nor was any communication had with the plaintiff and said Stephenson, by said trustees, who knew them to be the beneficial owners of the said property and solely responsible for the debt secured by it. No report has been made of said sale to them, and the plaintiff is ignorant whether any credit was allowed on said debt in consequence thereof, or how the account is claimed now to stand under said mortgage.

That said alleged sale was not an execution of the powers of the said mortgage deed, but an attempt irregularly to foreclose the mortgage on said property by a mere agreement between the said Bynum & Grier and the said Sloan, without any regard to the interest of the plaintiff and Stephenson, and is void against them.

That the exposure to sale of said property *in solido*, at *public auction*, *for cash*, *on the premises*, in a remote and unfrequented neighborhood, when there was due not more than $14,500 of the mortgage debt, was highly injurious to the mortgagors, and gave an assurance to the mortgagees of a foreclosure at an amount not greater than their debt.

That the said property was easily susceptible of division, and that a fraction thereof would have brought the amount due at the time of sale, such amount being within the compass of the means of bidders; that the property is situated far in the interior of the country, where capital does not abound, where there are divers iron manufactories on a small scale, embracing investments of from two to ten thousand dollars, but there was no ground for expecting a purchaser of the whole property at a cash sale, unless it were the mortgagees or their trustees, and the result was a sacrifice of the property at such price as they chose to bid. The plaintiff is informed that but a single bid was made, and that by the defendant, Sloan; that upon this the property was knocked down; but no money was paid and no deed executed; and soon thereafter the said trustees, the vendors, took possession in their character as such. No account has ever been rendered of the said sale, or of the application of the moneys arising therefrom; nor have the bonds given for said $40,000 been surrendered. Two of these bonds (or instalments) were not then due, but the whole sum was treated as if presently due, and the defendants claim, as a consequence of said sale, to hold all of the said property denuded of the obligation to account to the plaintiff and said Stephenson as equit-

able owners thereof; but the plaintiff is ignorant whether they claim any balance as still due on the debt secured by said deed in trust, or under that other deed of the 3d of January, 1859; or whether credits were entered at the date of said sale for the amounts to fall due on the 1st of July, 1860, and 1st of January, 1861.

That the effect of this course of proceeding, unless relieved against by this court, is to deprive the plaintiff of a property which had already been sold for $75,000, and was then worth more than that sum, to satisfy a balance of $40,000, of which only one-third was then due.

That on the 24th of May, 1860, the said Bynum & Grier took from said Hovey, who was then on the premises, a written instrument signed by him, which is appended as a part of this bill (Record, p. 25), which, without the recital of any consideration, purports to surrender to them, as trustees, not to said Sloan as purchaser, the entire property or estate known as "The High Shoals," comprising "14,000 acres of land, &c., &c., according to the purchase "made by them on the 28th of April, 1860," and agreeing thenceforward to hold the same under them as trustees; that said Hovey was then in a destitute condition, having no real interest at any time in said property, and would readily have signed any paper which might retain for him a home on said property; the said Darling still continued there after this pretended sale as the agent of the plaintiff and Stephenson, until some time in the year 1861, when, being a northern man, he returned to that section in consequence of the breaking out of the civil war. Whether said Darling knew of the execution of this paper the plaintiff is ignorant, but no notice of it was communicated to him.

That on account of the threatening aspect of affairs in the southern country, resulting in war, neither the plaintiff nor said Stephenson visited North Carolina again until since the close of the war, after the announcement by the Chief Justice of this court that the Federal courts

were again in the exercise of their full jurisdiction in that state.

That he is informed and believes that after the departure of Darling, as aforesaid, the said Bynum & Grier took possession of all the said property, and in the year 1862 entered into a contract in writing to sell the same to the defendants R. R. and J. L. Bridgers and ——— Powell, in fee simple, at the price of $65,000, on certain credits; that Powell has since died leaving a last will and testament, of which J. L. Bridgers is executor; that a large part of this purchase money is due and yet unpaid, and no title deed has been executed; that under said contract the said Messrs. Bridgers, Barron, and Powell were let into possession and carried on the the manufacture of iron thereon till the end of the year 1865, realizing gains to the amount of $15,000 per annum, or other large sum; that in December, 1865, the contractors for the purchase last named entered into an executory agreement with the defendant Charles Wilkes to sell to him the aforesaid property in fee simple, at the price of one hundred and fifty thousand dollars, ($150,000,) with interest, on certain terms of credit therein mentioned, viz: $10,000 on the 15th of January, 1866; $40,000 on the 1st of February, 1866; $50,000 on the 1st of July, 1866, and $50,000 on the 1st of January, 1867, the title to be retained as a security until the payment of $50,000, after which the said Wilkes should be entitled to a deed in fee simple upon his executing and delivering a mortgage deed to secure the balance; the said Robert R. Bridgers reserving the privilege of taking the fifteenth part of the ownership of the property in his own name; that under this agreement possession was immediately transferred to Wilkes, who, in January, 1866, removed from his residence in Washington, D. C., to said property, and has ever since been operating the iron works situate thereon, using the ores, timbers, and cordwood, and cultivating crops, making profits to the amount of

$15,000 a year, or other large sum; that $100,000 at least of said purchase money is still unpaid; that in the view of equity and justice the said property still belongs beneficially to the plaintiff, subject only to the lien for the sum of $40,000, with interest, secured by the mortgage aforesaid, which he offers to discharge.

That the purchasers, Messrs. Bridgers, Barron & Powell in the first instance, and Charles Wilkes in the second, are affected with notice of the equities of the plaintiff in the premises.

That the interest of the plaintiff in the property aforesaid, after satisfying the lien thereon, is of greater value than two thousand dollars.

And thereupon the plaintiff prays that a conveyance be decreed to be made to him by all the defendants of all the said property, upon his satisfying the lien of $40,000 and interest, as aforesaid (which he offers to do); that an account may be taken of the rents and profits of the same received by both of the aforesaid purchasers, and that the amount due be paid to him when ascertained; and if either of the aforesaid sets of purchasers shall be found not to be affected with notice as aforesaid, then that they shall be decreed to pay to him such amounts of the purchase money yet due from them, after satisfying the said lien, as shall appear to be due, and for "such other and further relief as his case shall require and may entitle him unto."

As exhibits with the bill are copies of the deeds, from page 9 to 25 of record.

1. Of the High Shoal Manufacturing Company, by Andrew Hoyle, its president, to Philip W. Groot, February 24th, 1854.

2. Philip W. Groot to Andrew Hoyle, trustee, same date.

3. Bynum & Grier to Aaron E. Hovey, January 1st, 1859.

4. Hovey to Bynum & Grier, same date.

5. Hovey to Bynum & Grier, January 3d, 1859.

6. Hovey to Stepenson & Olcott, January 8th, 1859.

7. Stephenson to Olcott, December 18th, 1867.

8. Surrender of Hovey to Bynum & Grier, May 24th, 1860.

9. Certificates of clerks and masters in equity showing no decree of foreclosure.

The defendant, Hovey, having admitted service of process and filed no answer, the bill was ordered to be taken *pro confesso* and set down for hearing *ex parte*, as to him.

The answer of the defendant, Wm. P. Bynum, appears in two parts, the one being put into the original bill, and the other after it had been amended and recast.

It states, record, p. 34: That "he and his co-executor, 'Thomas Grier, divided the labors and duties of their ad-'mininistraton, and the sole management of the High 'Shoal debt and mortgage was assigned to him, and his 'co-executor has no connection therewith except in mat-'ters of form."

He admits the history of the transfers of the property and the several deeds of conveyance thereof, as set forth in the bill, from the foregoing numbers 1 to 5 inclusive; also the surrender, numbered 8, but denies any knowledge of the alleged deeds from Hovey to Stephenson & Olcott, and Stephenson to Olcott, numbered 6 and 7.

He also produces as an exhibit a deed of conveyance of the property aforesaid from the aforesaid Philip W. Groot to Greene C. Bronson and Samuel Beardsley, subject to the mortgage to Hoyle, in trust for "The High Shoals Mining and Manufacturing Company," a corporation alleged to be created by a statute of the State of New York, dated the 8th of April, 1854; and alleges that immediately after this date this company took possession, operated the said property on a large scale in the manufacture of iron and iron fabrics, and in operating for gold until the 28th of April, 1860, during which the business of the company was conducted in this state by the plaintiff

and said Stephenson, the defendant Hovey, and Thomas Darling, all of whom, except Stephenson, resided on the premises. It also admits the death of Hoyle in 1856, his last will and testament, and the qualification of his executors in February, 1857; alleges that this New York company, though making large profits from the property, but diminishing its value from the use and destruction of timbers and ores used in the manufacture of iron, as well as the decay of mills, machinery, and buildings, and the wear and tear of thirteen mechanics, men slaves, who had been sold and mortgaged as part of the said property; but, failing to pay the mortgage debt, the defendants, in pursuance of the mortgage and the will of Hoyle, advertised a sale thereof on the 28th of December, 1858. That the stockholders in the High Shoals Manufacturing Company aforesaid, of which the aforesaid E. S. Stephenson was one, met and resolved to run the property up to $58,000, the estimated amount of their claim; upon a proposition of the plaintiff or Stephenson (Hovey being present and assenting) it was agreed that the thirteen slaves aforesaid should be sold and the amount of proceeds entered as a credit on Groot's bond, and that the debt should be further reduced by cash payments to $40,000, principal money, and that a new bond and mortgage should be executed to this defendant and Grier to secure this sum; that the slaves were accordingly sold, the plaintiff, the defendant Hovey, and the stockholders being bidders in the auction, and brought the sum of $9,160; and the real estate was then set up and bid off by said Hovey at what sum the defendant does not remember. The defendant, the said Hovey, Stephenson, and the plaintiff met in Charlotte, North Carolina, on the 1st of January, 1859, to consummate the arrangement. After entering credit for $9,160 it was computed that there was still a balance due of $7,858.33 above $40,000; and said Stephenson, being a stockholder in said company, and there being dividends due him of $916

and $785, these sums were deducted from the aforesaid sum of $7,858.33, leaving $6,157, which was paid by Hovey, the plaintiff, Olcott, paying nothing, and a copy of the receipt given by Stephenson to defendants for $785.83 is inserted; that the defendants then executed and delivered to said Hovey a deed in fee for the said High Shoals property, and took from him a penal bond in the sum of $80,000, conditioned to be void on the payment of $40,000, in three instalments, respectively, on the 1st of January, 1860, the 1st July, 1860, and 1st January, 1861, and a mortgage on said property further to secure this sum. Copies of these conveyances, believed to be correct, are set forth in the bill. The penal bond of Groot was then canceled and delivered to Hovey.

That the mortgage, by deed of the 3d day of January, 1859, is still outstanding, and the defendants Bynum & Grier have paid some costs and are liable for more, and that the lawsuit therein mentioned is still pending and undetermined.

That he denies that he had any knowledge, belief, or even conjecture of the allegation in the bill that Hovey was a mere nominal purchaser, and that the plaintiff and Stephenson were the real purchasers of the said property; that from information he believed Stephenson to be in failing circumstances, and that the plaintiff and Hovey were insolvent, or nearly so; that with this conviction he took the individual bond of Hovey and relied on the mortgage for the security of the debt, considering him the purchaser according to the import of the conveyances, and no intimation of any different arrangement was made to him.

That he denies all knowledge of the existence of the deed from Hovey to Olcott and Stephenson bearing date the 8th of January 1859, as alleged in the bill.

That after the execution of the deed aforesaid from Groot to Bronson & Beardsley, in trust for "The High Shoals Mining and Manufacturing Company," all busi-

ness at the place was conducted in the name of said company, by T. Olcott or Thomas Darling, agent, and it so continued until the sale on the 28th of April, 1860; and even after that time, in settling up affairs of the company, notes were given under the same name and style. No intimation was given to him by any of the parties that the plaintiff and Stephenson had a deed from Hovey for the premises; that Hovey, before and after the purchase of January 1st, 1859, occupied the chief dwelling house, and seemed to defendant, on his visits there, to be the proprietor, but he does not pretend to know their private relations.

That on failure to pay when the first instalment became due, January 1st, 1860, and payment was demanded, the defendant advertised the property for sale, to take place at High Shoals on 28th of April, 1860. The stockholders of "The High Shoals Manufacturing Company" met and resolved to run the property up to the amount of their debt, which was about $45,000, and by their direction the defendant, Mr. Sloan, bid it off for them at that sum or thereabouts; that Hovey and Darling were present, informed of this arrangement, and consented to it; that the company last aforesaid did not desire to purchase, and this defendant made many efforts to induce Hovey to pay up and other parties to purchase before said sale; that Sloan was instructed to bid no more than the debt due to said company, and this was known to Hovey and Darling.

That he made no deed to Sloan at the time, believing his purchase as aforesaid, for the use of the company, would suffice, but that on the 12th of June, 1868, he and his co-executor, Grier, made a deed in fee conveying said property to him in trust for said company.

That said sale was made in perfect good faith, and in obedience to a plain and peremptory duty, with no purpose to reinvest the title in himself, and with a conviction derived from Hovey and Darling that payment of the debt would not be made otherwise.

That said Hovey and Darling assented to said sale, and acquiesced in the same, and in consideration thereof surrendered up to this defendant the said property; and on the 24th of May, 1860, the former executed to this defendant, the deed of abandonment and attornment set forth by the plaintiff, and which is referred to as part of this answer; that it was executed on the premises in the presence of Darling and with his assent.

That he then credited the penal bond of Hovey with the amount of Sloan's bid, and the bond was canceled in discharge of the debt; but whether he delivered it to Hovey, or what became of it, he cannot state; he has made diligent search, and it is not in his possession.

That from the time of this sale neither Hovey nor Darling, both of whom remained on the premises, made any claim to the property, but recognized the title of the defendant as trustee of said company; and Darling sold the stock, implements, &c., of the High Shoal Mining and Manufacturing Company, remaining there, and proceeded to close up its business. He remained there by permission more than a year, and Hovey several months after the sale, until he procured friends to enable him to return to New York.

That in the latter part of the year 1860, or early in 1861, the plaintiff came to North Carolina, visited the said property and this defendant; and in several conversations with this defendant did not intimate any dissatisfaction with said sale, but fully admitted the rights of said company by virtue thereof; that in the spring of 1861 the plaintiff visited this defendant on two occasions with the view of leasing part of said property for mining purposes, and of purchasing, if this proved successful, and on the latter occasion did procure from this defendant, as trustee, a short lease in writing, not exceeding twelve months, of part of said property; aad this defendant is informed that he made explorations for gold or other minerals thereunder, and he calls for the production of said lease.

That he denies that he delivered up, according to his recollection, the certificates of stock of the said company, as charged, and insists that they belong to the stockholders.

That he admits a contract with R. R. and J. L. Bridgers in writing, in March, 1862, for the sale of the said property for the sum of $65,000, of which $30,000 was paid in bills of the banks of North Carolina, which were then considerably depreciated, and the balance of $35,000 was to be paid in specie, or its equivalent, in three and four years, with interest, and the title reserved as a security. The whole of this balance remains unpaid.

That the said Messrs. Bridgers were immediately let into possession and operated the said property till they sold out to Charles Wilkes, the defendant, at the time stated in their answer.

That he denies that the High Shoal Manufacturing Company has saved itself whole in the repurchase of the property.

That he charges that this suit is brought by the instigation of the defendant Wilkes, as alleged in the answer of the defendants Bridgers.

And in answer to the amendments of the bill he states that the plaintiff had full notice of the time of sale on the 28th of April, 1860, both from the defendant and from said Darling, and the same was postponed to that day at the request of the plaintiff and said Stephenson, as will appear from a letter of the plaintiff, which he prays may be taken as a part of his answer.

That the said property was sold *in solido* for the reason that it was acquired and used by said company *in solido;* was sold to Groot, in 1854, and to Hovey, in 1859, as an entire property, and reconveyed by them in mortgage as such; that he was advised by counsel that he had no right under said mortgage to sell otherwise, and that it was expedient so to sell from the nature of the property;

that the plaintiff had notice of the purpose to sell in that way and made no objection on that account.

That he denies that the property is situated in a remote and unfrequented part of the country, and was sacrificed on that or any other account, but states that it is within twenty-five miles of Charlotte, six miles of Lincolnton, near a railroad, &c.

That great pains were taken to induce men of capital to attend the sale, and some were present, but, after viewing the property, they would not consent to bid beyond $35,000.

That $43,200, which was Sloan's bid, was the *fair and full cash value* of said property in its then dilapidated condition, and more could not have been obtained by dividing and selling it in lots; for that this was considered by the defendant and others of the company before the sale and was left in such doubt they resolved on the course that was taken.

That the price at Sloan's bid was not inadequate, as appears from a comparison with the purchase by Hovey on the 1st of January, 1859.

That the mortgage deed had expressly conferred power to sell the whole, although but an instalment was due.

That he has no knowledge of the purchase of the interest of said Stephenson in said property by the plaintiff, and charges that he paid no valuable consideration therefor, and that he paid no part of the purchase money in the sale to Hovey.

That he does not admit the allegation that but a single bid was made at the sale of the 28th of April, 1860, and, although not positive, he is of the decided belief that several bids were made by other parties before the property was knocked down to Sloan.

The answer of the other executor and trustee, Thomas Grier, is merely formal, admitting that he joined in the deeds of January 1st, 1859, and January 3d, 1859, and 24th of May, 1860, but alleging that his co-executor

and trustee, Wm. P. Bynum, transacted all the business connected with the said High Shoal property, and refers to his answer for his information and belief in the premises.

The answer of the defendant, Wm. Sloan, states that he believes the several conveyances of the property aforesaid, prior to the 8th of January, 1859, were made, but that he knows nothing of the last deed, and did not hear of it from Hovey, Olcott, or Darling up to their departure from North Carolina; that he, the defendant, was a witness to the deed of 24th May, 1860, and that Olcott was his guest on the property for several weeks in the spring of 1861, and brought with him a Mr. Muir and said he came with a view of buying the property; that they went to see Bynum and returned saying they had a lease of the same; that on this visit, in frequent conversations, the plaintiff, Olcott, admitted that he was aware of the sale on 28th April, 1860; that he considered the right of redemption destroyed, and hoped to raise money to buy the property; that since the war he received letters from Olcott inquiring who owned the property and proposing to buy in conjunction with him; that this defendant, at the sale aforesaid, bid off the property at a price between $40,000 and $45,000; did not buy as agent of Bynum & Grier, but of the High Shoals Manufacturing Company, being directed by them to run it up to the amount of their debt and costs; that they did not wish to buy, but were anxious that some other person should; that Darling resided on the property as agent of the High Shoals Mining and Manufacturing Company, and defendant understood from him that Stephenson was President and Olcott Secretary of that company, and that neither of them ever claimed any individual interest in said property. After the sale this defendant rented the same from Bynum & Grier, and Darling remained as a boarder, still acting as agent of said company; that the defendant believes that Charles Wilkes instigated this

suit; that he did not take a deed as purchaser from Bynum & Grier, because he believed their old title as trustees would be sufficient for the company as *cestui que trust*, and he adopts the answer of the defendant, Bynum, to the amended bill.

The defendants, R. R. & J. L. Bridgers, by their answer admit that in March, 1862, they, with the defendant, Baron, and the said J. L. Bridgers representing, as executor under a power, the estate of Joseph J. W. Powell, deceased, contracted with the defendant, Bynum, for the purchase of said property on the terms set forth in the answer of said Bynum & Grier; that the property had been conveyed, as alleged in the bill, from the High Shoals Manufacturing Company by Hoyle, President, to Groot, and mortgaged by the latter; the death of Hoyle; the sale by his executors and trustees, Bynum & Grier; the purchase by Hovey; the conveyance by deed to him; the mortgage by him to Bynum & Grier as trustees; and that they are informed and believe that said trustees sold the same, and the High Shoals Manufacturing Company purchased, through Sloan as their agent.

They had no knowledge of the property till March, 1862—purchased to get a situation for the employment of their slaves away from the seat of war; before doing so they inquired about the title and were informed that it was valid, except as to a few acres, by other professional men, and by the defendant, Bynum, a lawyer of standing, and the agent of the High Shoals Manufacturing Company, who were the alleged proprietors; that the contract was reduced to writing, in duplicate, but both copies were lost by the subsequent invasion of that section by a hostile army; but the terms are well understood by the parties, and are truly set forth in the answer of Bynum.

That they are ignorant of all the matters alleged in the bill prior to their purchase; they believe the statements

in Bynum's answer to be true, and had no notice of any equity in the plaintiff; they had taken possession, made many improvements, erected furnaces and forges when they contracted to sell, and their outlay exceeded their profits; that when they were in negotiation with the defendant, Wilkes, as to the sale, he said he was well acquainted with the property and the title, and declined the advice given him to inquire into the same; that he made no complaint as to title until sued for a part of the purchase money; that, failing to get indulgence, he filed an injunction to restrain the collection of the purchase money, which was dissolved, and that Wilkes then instigated this suit, &c.

The defendant, J. L. Bridgers, suggests that he was adjudicated a bankrupt the 23d of May, 1868.

The defendant, B. B. Baron, answers that he was an inactive partner in the aforesaid purchase of the Messrs. Bridgers; that he had no notice of the plaintiff's claim of title, and insists that he is a purchaser for value without notice. That there is a balance due from himself and partners to the amount of $35,000, subject to a credit of $7,000 worth of stock which they own in the High Shoals Manufacturing Company.

That there is a balance due from Wilkes on his contract of $140,000, with interest from the 15th January, 1866.

Without being positive he believes the amount of expenditure on the property while in the possession of himself and partners exceeded the receipts.

That he was adjudged a bankrupt the 28th of May, 1868.

The defendant, Charles Wilkes, answers and admits that he made the purchase of the Messrs. Bridgers & Company, as stated in the bill, in December, 1865, and in January, 1866, made a payment of ten thousand dollars, and entered into possession of the property; that he found the improvements on the same greatly out of re-

pair, insomuch that he, in a short time, in order to make them available, expended $35,000 in repairs and new structures; that another insalment becoming due early in 1867, prior to that date he called upon his bargainers for an abstract of title; they referred him to said Bynum, and it was not furnished by him; that defendant caused an investigation of the title to be made, and the facts in regard to it were found to be as set forth in the plaintiff's bill, except that the *cestuis que trust* of the defendant, Hovey, were unknown; that upon the advice of counsel he refused to make further payment until a good title should be secured, and filed an injunction bill, and an order of injunction is pending; that his contract to purchase was made in the City of Washington, in December, 1865; that at the time he had a general idea of the mineral and manufacturing resources of said property, but had no particular knowledge of the title thereof; that he was informed by the defendant, R. R. Bridgers, at that time that the title to the property was indisputable, and that he and his associates could make a perfect title in fee simple thereto; that upon the faith of this assurance, and a stipulation to that effect in the contract, he made the purchase; that he had no knowledge at that time of the plaintiff or Stephenson, or of their claim to this property, but believed the title of his vendors was good in every respect. That his refusal to make further payments was done in good faith for defectiveness in the title.

The plaintiff put in a general replication to all these answers, and both parties have filed exhibits and taken testimony.

The plaintiff's exhibits with his bill, from 1 to 5, inclusive, are admitted.—(Bynum's answer, Rec., 34, 35, and 36, and agreement of counsel, 131.)

In addition to these he files—

1st. Copy of deed from Hovey to Stephenson & Olcott, dated 8th January, 1859, with the evidence and order of

probate and certificates of registration, &c.—(Record, p. 47–53.)

To this also relates the agreement of counsel.—(p. 131.)

2. Having with his bill filed a quit-claim deed from Stephenson to Olcott, dated December 18th, 1867, with certificates of probate and registration.—(pp. 23, 24.)

3. The surrender by Hovey to Bynum & Grier, May 24th, 1860.—(p. 25.)

4. The certificates of clerks in equity of no decree of foreclosure.—(pp. 24, 25.)

5. License by Bynum to John L. Muir and Theodore Olcott, April 16, 1861.—(p. 118.)

6. Certificates of the transfers of their stock by the stockholders of the High Shoal Manufacturing Company.—(pp. 94–99.)

7. A letter from Bynum to Osborne & Wilson as to title of the property, August 31st, 1867.—(Rec., pp. 53, 54.)

8. Copy of advertisement of sale, Jan. 31st, 1860.—(pp. 54, 55.)

He has likewise filed the depositions of Aaron E. Hovey, one of the defendants, taken by order of the court, (Rec., p. 47, extending from 56 to 61); Thomas Darling, (61 to 69); and Theodore Olcott, the plaintiff himself, with documents, (from 69 to 83.)

The defendants filed as exhibits—

1. A copy of the last will and testament of Andrew Hoyle.—(p. 115.)

2. A copy of deed from Groot to Bronson & Beardsley, April 18th, 1854.—(119 to 125.)

3. A copy of deed from Bynum & Grier to Wm. Sloan, 12th June, 1868.—(125 to 127.)

4. Also put in, the instrument of surrender, 24th May, 1860, and license, 16th April, 1861.

Also the depositions of the defendants, *Wm. P. Bynum* and *Wm. Sloan*, each twice taken; the first from p. 84 to 89 and from 100 to 106; the second from 91 to 93 and from 106 to 110. Both of these are excepted to by the

plaintiffs. As to the first deposition, pp. 93, 94; as to the second, 114.

These exceptions were referred to the clerk, but not reported upon. The matter excepted to can be readily seen.

ARGUMENT.

I. There is no equity of either of the purchasers, which stands in the way of the relief sought by the plaintiff, or places them in a better condition than their vendor. Neither acquired the legal title. As to Wilkes, he was content with a contract to sell, on the part of his vendor, stipulating for the execution of title upon the payment of the purchase money; and Bridgers & Co. agreed to purchase from Bynum on like terms. Both knew, or should have known, (the title being derived immediately to Hovey by the deed to him of Jan. 1st, 1859, and the property being encumbered by the mortgage of the same date,) that Bynum & Grier were but trustees under a mortgage, of which there was no evidence of foreclosure either by a decree of a court or a deed of conveyance from them.—(Henderson vs. Stewart, 4 Hawkes, 256; Thompson vs. Blair, 3 Murphey, 583; Christmas vs. Mitchell, 3 Ired. Eq., 335; Sugden V. & P., 499.)

Had they made the inquiry on which they were put by this state of the title on the registry, they would have learned that no deed had ever been made by Bynum & Grier, nor any purchase money paid them by any vendee; both of which are necessary to put those purchasers on better ground than their vendors.—(Howlett vs. Thompson, 1 Ired. Eq., 369; Maxwell vs. Wallace, Burb. Eq., 283.)

II. The decision of the cause then depends on the validity of the alleged sale of the 28th of April, 1860, as a bar to the plaintiff's interest in the property. And it is to be remarked that the trustee who transacted the entire busi-

ness (his answer, Rec., 34,) had an interest adverse to the plaintiff, being both a stockholder in the High Shoal Manufacturing Company (his dep., Rec., p. 103,) and president, (Rec., 129.) It is, then, the case of a mortgagee with a power of sale, and the manner of its execution is liable to the strictest scrutiny.

That the plaintiff may show that he and his cotenant, Stephenson, had the beneficial interest in the property, notwithstanding the form of the title to Hovey and the mortgage by him and the statute of frauds, is established by the well known doctrine of equity, that "if one purchase an estate for another, with the money of the latter, a trust results to the latter."—(Henderson vs. Hoke, 1 Dev. & Bat. Eq., 119; Trice vs. Prott, Ibid., 626; Cook vs. Redman, 2 Ired. Eq., 623; Thompson vs. Nowlin, 3 do., 338; Pegues vs. Pegues, 5 do., 418; Hargrave vs. King, Ibid., 430; Taylor vs. Taylor, 1 Jones' Eq., 246; Hanf vs. Howard, 3 do., 440; Turner vs. Elford, 5 do., 106; Shelton vs. Shelton, Ibid., 272; Riggs vs. Swann, 6 do., 118.)

That this purchase was made by Stephenson and the plaintiff, and that Hovey was only their agent, is manifest from the deposition of Hovey, (Rec., p. 56, 7, 8 et seq.; Darling, 62, 3, 4, 5 et seq.; Olcott, 71, 2, 3 et seq.,) and numerous facts and circumstances showing that they were recognized as the purchasers by the defendants.

It is submitted that the alleged sale was no bar, because—

1st. The sale was made for cash *in toto*.

The trustees had no power to sell for cash *in toto* at that time. Only one-third of $40,000, with interest on that third from January 1st, 1859, was then due and demandable. The plain duty of the trustees was either to wait till the whole fell due, 1st Jan., 1861, after which they could have sold for cash; or, if resolved to sell at once, to have set up the property for cash, as to one-third, credit on another third till the 1st of July, 1860, and on the bal-

ance till 1st of Jan., 1861. The mortgage does not contain the word "cash;" it was a mere requirement of the trustees, without authority, which chilled the sale and depressed the price by thousands of dollars.

If a sale for cash *in toto* was not wholly *ultra vires*, the only footing on which it could be maintained, even upon the allegations of the defendants, would have been to credit the one-third of the debt then due upon the mortgage, require Sloan to pay down the residue of $26,666.66, and pass this over to the plaintiff.—(See latter clauses of mortgage, Rec., p. 19.) The alleged purchaser had no right both to the property and the money. A trustee has no right to receive money before it is due, (Broughton vs. Haywood, Phillips' Eq., 380,) much less to raise it by sale.

2d. The evidence justifies the conclusion that Bynum & Grier, as trustees, were the purchasers at that sale; that is the view expressed by Mr. Bynum in the letter to Osborne & Wilson, August, 1867.—(Rec., 54, margin 155-6.) It is clearly imported in the surrender taken from Hovey. —(Rec., 25.) It is further apparent from the continued action of those two defendants as trustees, with no other evidence of title except the deed of Jan. 1st, 1859. Whereas, if Sloan had purchased for the company, he or they should have been invested with title, and the trustees denuded. This was never attempted till after the filing of the bill in this suit.—(See deed, Rec., 125–6.)

If this be true, the old doctrine applies, that a trustee cannot purchase from himself.—(Fox vs. McKreth, Leading Cases in Eq., p. 72, with notes; Brothers vs. Brothers, 7 Ired. Eq.; Patten vs. Thompson, 2 Jones' Eq., 285; Devour vs. Faening, 2 John. Ch., 252.) It is also rendered probable by the indistinctness of the recollection of all the witnesses for the defendant; Mr. Bynum supposing that White was the bidder, not Sloan.—(His letter to Wilson & Osborne, Rec., 54.) Mr. White supposing he was present at this sale, but upon cross-examination he appears to have mistaken it for the Groot sale.

ness (his answer, Rec., 34,) had an interest adverse to the plaintiff, being both a stockholder in the High Shoal Manufacturing Company (his dep., Rec., p. 103,) and president, (Rec., 129.) It is, then, the case of a mortgagee with a power of sale, and the manner of its execution is liable to the strictest scrutiny.

That the plaintiff may show that he and his cotenant, Stephenson, had the beneficial interest in the property, notwithstanding the form of the title to Hovey and the mortgage by him and the statute of frauds, is established by the well known doctrine of equity, that "if one purchase an estate for another, with the money of the latter, a trust results to the latter."—(Henderson vs. Hoke, 1 Dev. & Bat. Eq., 119; Trice vs. Prott, Ibid., 626; Cook vs. Redman, 2 Ired. Eq., 623; Thompson vs. Nowlin, 3 do., 338; Pegues vs. Pegues, 5 do., 418; Hargrave vs. King, Ibid., 430; Taylor vs. Taylor, 1 Jones' Eq., 246; Hanf vs. Howard, 3 do., 440; Turner vs. Elford, 5 do., 106; Shelton vs. Shelton, Ibid., 272; Riggs vs. Swann, 6 do., 118.)

That this purchase was made by Stephenson and the plaintiff, and that Hovey was only their agent, is manifest from the deposition of Hovey, (Rec., p. 56, 7, 8 et seq.; Darling, 62, 3, 4, 5 et seq.; Olcott, 71, 2, 3 et seq.,) and numerous facts and circumstances showing that they were recognized as the purchasers by the defendants.

It is submitted that the alleged sale was no bar, because—

1st. The sale was made for cash *in toto*.

The trustees had no power to sell for cash *in toto* at that time. Only one-third of $40,000, with interest on that third from January 1st, 1859, was then due and demandable. The plain duty of the trustees was either to wait till the whole fell due, 1st Jan., 1861, after which they could have sold for cash; or, if resolved to sell at once, to have set up the property for cash, as to one-third, credit on another third till the 1st of July, 1860, and on the bal-

ance till 1st of Jan., 1861. The mortgage does not contain the word "cash;" it was a mere requirement of the trustees, without authority, which chilled the sale and depressed the price by thousands of dollars.

If a sale for cash *in toto* was not wholly *ultra vires*, the only footing on which it could be maintained, even upon the allegations of the defendants, would have been to credit the one-third of the debt then due upon the mortgage, require Sloan to pay down the residue of $26,666.66, and pass this over to the plaintiff.—(See latter clauses of mortgage, Rec., p. 19.) The alleged purchaser had no right both to the property and the money. A trustee has no right to receive money before it is due, (Broughton vs. Haywood, Phillips' Eq., 380.) much less to raise it by sale.

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—(Rec., 111; see also 104.) Sloan, in his answer, (Rec., 45,) stating the amount of his bid vaguely "between forty and forty-five thousand dollars," and the difficulty in ascertaining its precise amount by any testimony; the doubt as to whether any other bid was made, and, if so, by whom; the total failure to make any written memorandum of the affair by any one; to execute any deed, give any credit or receipt—so differently from the transaction of sale in December, 1858, when the parties spent three days in Charlotte making assurances, paying money, &c.; all going to show that the transaction in the estimation of those conducting it was regarded as of little importance, and was designed, as expressed by Sloan in his deposition, (Rec., 110,) "to close out the interest" of the plaintiff and and his co-tenant.

3d. But if the company be assumed to have been the purchaser, the sale was made in such disregard of the interests of the plaintiff that equity will not permit it to stand. The trustee had an interest adverse to the mortgagor, as has been shown; so also had Sloan.—(His deposition, Rec., 109.) On failure to pay the first of these instalments a sale is resolved upon, for cash, and *in solido*. In North Carolina a deed in trust, after registration, is considered as a mortgage.—(Stimpson vs. Fries, 2 Jones' Eq., 156.) And in practice a foreclosure is made only by sale.—(Green vs. Crockett, 2 Dev. & Bat. Eq., 65; Ingraham vs. Smith, 6 Ired. Eq., 97; Averitt vs. Wood, Busb. Eq., 272.) And before a trustee can claim that he has foreclosed the rights of the mortgagor by a sale *in pais*, he should be able to show that it was such a sale as would have been ordered by a chancellor if application had been made to a court. He should be indifferent between the debtor and creditor, and take care of the interests of both.—(Hill on Trustees, 476–480; Boyd vs. Hawkis, 2 Dev. Eq., 195; Hunt vs. Bass, Ibid., 292; Johnson vs. Eason, 3 Ired. Eq., 330; Hawkins vs. Alston, 4 do., 137; Patten vs. Thompson, 2 Jones' Eq., 285; Elliot vs. Pool, 3 do., 17; Ord vs. Noel, 5 Mad., 440.)

1st. No chancellor would have ordered a sale of this vast property *for cash* when only an instalment of $13,000 was due. Sloan (in deposition, Rec., 108) admits that the property would have sold better on a credit, and in that case might have been enhanced in price by dividing it into lots.

2d. So a sale of the property *in solido* in that state of the mortgage debt was a great wrong to the plaintiff. It may well be questioned whether a sale by a sheriff, under similar circumstances, would not have been void.—(McLeod vs. Pierce, 2 Hawks, 110.) If the property can be separated, and exceeds the debt, no more ought to be sold than will pay the debt.—(De la Bigarre vs. Bush, 2 John's, 490.) The presumption is that a sale in parcels will be most advantageous.—(23 How. Prac. Rep., 385.)

The opinion of the defendants' witnesses, that a sale in lots would not have been more advantageous, is entitled to little weight, when they themselves prove that no single estate of such magnitude exists, and none equal to it has ever been exposed at auction sale in that section of country (Rec. 103, 109, 111); and it is obvious that by reducing the parts within the ability of bidders much more competition might have been expected. Would any prudent individual, with such a debt and such means of payment, have disposed of the property, at the time, and upon the terms adopted by the trustees? Suppose the amount bid had been less than the debt, and a balance were claimed, would a court hesitate to order a resale—or that after the 28th of April, (say in May) 1860, the plaintiff had been tendered the $14,000 due, would not the sale have been set aside?

3rd. As to the place of sale, any neighboring town would obviously have been more eligible.

Neither Sloan nor the High Shoal Manufacturing Co., or any one for either of them, paid any money or released any debt by means of this sale; and all parties occupy the same relative positions as if it had never taken place.

III. It is claimed in the answers, that the plaintiff acquiesced in this sale, 1st, by a letter from New York, Feb. 25th, 1860 (Rec. 105). There is nothing in this letter consenting to a sale for cash *in toto*, or agreeing to anything variant from the terms of the mortgage; it asks only that the trustees will not be too rigorous, and allow some six or eight weeks longer for an endeavor to raise money. This letter, let it not be overlooked, affords plenary evidence that Bynum knew he was dealing with Olcott and Stephenson, as the purchasers: 2nd, that he came to N. C. "in the latter part of 1860, or early in 1861, was apprised "of this sale, expressed no dissatisfaction therewith, but "fully admitted the rights of the company claimed by "said sale" (Rec. 39); 3rd, that in April, 1861, he, in conjunction with Muir, asked and obtained a lease or license from Bynum as trustee to prospect for minerals in the property.

It is absolutely proved by the depositions of Hovey, Darling, and Olcott, that the plaintiff was not at High Shoals in all the year 1860. He made one visit in April, 1861. Saw Bynum on the railroad cars, and at Catawba Court (Rec. 76–7); in the latter interview obtained a *license* to prospect. It is not alleged in Bynum's answer that in their interview there was any settlement or statement of account. There is no acquiescence in all this. Unless the defendant had fully informed the plaintiff as to the whole affair, and shown a statement of the account to which the plaintiff assented, there is no acquiescence, and it is no bar.—(West vs. Sloan, 3 Jones' Eq., 103; Crowe vs. Ballard, 2 Cox Ca., 253; Cann vs. Cann, 1 P. W., 733; Roche vs. O'Brien, 1 Ball & Beet, 339; Gowland vs. De Faria, 17 Ves., 25; Moore vs. Reid, 2 Ired. Eq., 582; Ryder vs. Bickerton, 3 Swans, 81; Cholmendely vs. Clinton, 2 Meriv., 362.)

It is pretended that Hovey and Darling, as agents, gave their acquiescence. They both deny it; and neither of them had authority to bind the plaintiff or Stephenson by acquiescence.

In the interrupted relations of New York and North Carolina, and the suspension of justice in the courts of the United States, the plaintiff has sought redress as early as practicable.

IV. But it was objected in the court below, that the plaintiff could not maintain his suit because of the insufficiency of the proof of the alleged deed from Hovey to Stephenson and Olcott, bearing date Jan. 8th, 1859, to entitle it to registration. This deed is alleged in the bill to have been lost or destroyed, before probate and registration. Is a party to lose the estate granted, by means of the loss of the the deed before registration? By the statute of North Carolina, Rev. Code, chap. 37, conveyances of lease are required to be "acknowledged by the grantor or proved on oath by one or more witnesses" and registered. In a case like the present, where there can be no literal compliance, on account of the loss of the original deed, which was a part of the primary evidence, we must resort to secondary evidence according to the rules of the common law. This can be done in a court of probate, in proceedings ex parte, as well as in courts of contestation. Here a copy is alleged to have been preserved, and three copies are set out in the record, one deposited in the office of the clerk with the bill, (Rec. 21,) the second with the affidavits of the plaintiff, the bargainee, showing the loss of the original, and of the bargainer and subscribing witness, and the order and certificate of registration (Rec. 48 to 53); the third appended to the depositions of Hovey, Darling, and Olcott, by which its due execution and delivery is again proved so that it may be read on the trial. (Rec. 81–2, and the references to it in the deposition of Hovey in Rec. p., 57, Darling 64, Olcott, 73–4–5, 81.) The law of evidence requires in the circumstances of this case—1st, that the loss of the original shall be proved by the evidence of the plaintiff, the bargainer, in whose custody it was last seen. 2nd, that the

alleged copy is a true copy, and that the original was executed and delivered according to its import. Upon such proof the deed was properly ordered to be, and was, registered. The agreement of counsel, p. 131, was entered into in consequence of a legislative change in the judges of probate, about the time of the date of this order. This was ample proof to admit it to registration.—(Carrier vs. Hampton, 11 Ired. Law, 307; Latham vs. Bowen, 7 Ired. Law, 337; Also McKennon vs. McLean, 2 Dev. & Bat. L., 78; Simmons vs. Gholson, 5 Ired. L., 401; Likewise for the circumstances in which copies may be introduced, Baker vs. Webb, 1 Haywood, N. C., 43; Kello vs. Maget, 1 Dev. & Bat., 224; Harper vs. Hancock, 6 Ired., 124; Roberts vs. McLean, 8 do., 522; McRae vs. Morrison, 13 do., 46; Winn vs. Patterson, 9 Pet., 663; De Lane vs. Moore, 14 How., 253; United States vs. Delespine's Heirs, 12 Pet., 654.) But the registration having been allowed without primary evidence, as contemplated by the statute, the certificate of registration does not entitle the deed to be read on the trial according to the 16th section of the statute; and it has therefore to be proved again.—(Carrier vs. Hampton, and Latham vs. Bowen, supra; 1 Story's Equity, sec. 88, and cases cited.)

V. But if this deed were rejected, there is abundant proof by parol, that Stephenson and Olcott were entitled to the beneficial interest in the property, by their purchase in the name of Hovey and their payment of part and securing of the balance of the consideration.—(See cases above cited of trusts by parol, p. 35.)

And the plaintiff produces the deed of Stephenson, releasing all his right in the premises to himself (Rec. p. 23).

ADDENDUM.

In compliance with the amendment of the 21st rule, plaintiff assigns as errors—

1st. That the circuit court refused to allow the alleged deed from Aaron E. Hovey to Eben S. Stephenson & Theodore Olcott, dated January 8th, 1859, to be read upon the trial of the case.

2d. That the decree of said court was in favor of the defendants, ordering the plaintiff's bill to be dismissed, whereas the said decree should have been in favor of the plaintiff, allowing him relief as prayed in his bill of complaint.

STATUTES OF NORTH CAROLINA REFERRED TO.

As to the loss of corporate franchises by non user. (Rev. Code, chap. 26, sec. 30.)—"When any act shall have passed creating a body corporate, and the corporators for two years shall neglect or fail to organize the company and carry into effect the intent of the act, or, when organized, if they at any time for two years together shall cease to act, then such disuse of their corporate privileges and powers, deemed and taken as a forfeiture of their charter."

As to probate and registration of deeds. (Ibid., chap. 37, sec. 1.)—No conveyances for land shall be good and available in law unless the same shall be acknowledged by the grantor or proved on oath by one or more witnesses, in the manner hereinafter directed, and registered in the county where the land shall lie, within two years after the date of said deed; and all deeds so executed and registered shall be valid and pass estates in land without livery of seizin, attornment, or other ceremony whatever.

Sec. 2. All deeds, bills of sale, powers of attorney, and other instruments of writing required or allowed to be registered may be admitted to registration in the proper county, upon being acknowledged by the grantor, or proved on oath before one of the judges of the supreme court, or superior court, or in the county court of the

county where the land or estate is situated, unless otherwise directed, or before the clerk of such court, or his deputy.

Sec. 16. The registry or duly certified copy of the record of any deed, power of attorney, or other instrument required or allowed to be registered or recorded, may be given in evidence in any court, and shall be held to be full and sufficient evidence of such deed, &c., although the party offering the same shall be entitled to the possession of the original, and shall not account for the non-production thereof, &c.

Sec. 32 allows two years after the adoption of this code for the probate and registration of deeds, and from that time to the present acts have been passed at intervals of two years, allowing further time for this purpose.

And, by chapter 21, sec. 2, the governor is authorized to appoint and commission one or more commissioners in such of the states of the United States, or in the District of Columbia, or any of the territories, as he may deem expedient, who shall continue in office during the pleasure of the governor, and shall have authority to take the acknowledgment or proof of any deed, mortgage, or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings, to be used in this state. And such acknowledgment or proof, taken or made in the manner directed by the laws of this state, shall have the same force and effect, for all purposes, as if the same had been made or taken before any competent authority of this state.

W. A. GRAHAM,
Solicitor and Counsel for Plaintiff.

IN THE

Supreme Court of the United States.

IN EQUITY.—No. 119.

THEODORE OLCOTT

against

CHARLES WILKES, and others.

Defendant's Brief.

B. F. MOORE,
WILL. H. BATTLE,
Solicitors and Counsel for the Defendant.

IN THE

Supreme Court of the United States.

THEODORE OLCOTT

vs.

CHARLES WILKES and others.

In Equity.—No. 119.

I. The essence of the complaint is, that on the 1st day January, 1859, the defendants Bynum and Grier were the *legal* owners of the lands in dispute, and held them in trust for the defendant, Hovey, upon condition, that Hovey should pay a certain price for them in equal installments falling due on 1st January, 1860, 1st July, 1860, and 1st January, 1861: That on the 8th day of January, 1859, Hovey by deed, assigned his trust estate to the plaintiff Olcott, and one Stevenson, who, in 1867, by deed assigned his interest therein to the plaintiff; that the first of these deeds was lost, and therefore never was registered, but that a copy was:

That neither Hovey nor his assignee, complied, or offered to comply with the condition to pay the stipulated price whereby his estate in trust was to be secured and become absolute:

That in consequence of such failure, the estate of said Hovey and his assignee was, on 28th of April, 1860, exposed to sale and sold; but that, by reason of frauds and irregularities in the sale, the rights neither of said Hovey nor his assignee passed; but remained unchanged, and still continue to remain unaffected by the attempt to sell:

That afterwards, to-wit: in March, 1862, the defendants Bridgers and others, with notice of the rights of the plaintiff,

purchased said property of the defendants Bynum and Grier, and paid in part $30,000, and became bound to pay $35,000 more:

That Bridgers occupied and used the property, making large profits, till January, 1866, when the defendant Wilkes, with notice of the plaintiffs rights, purchased of Bridgers the same property at the price of $150,000, of which the sum of $10,000 was paid in cash and the residue secured by retainer of title.

Upon these averments the plaintiff concludes that he is entitled to have, (and prays that it be so decreed) 1. the sale and purchase in April, 1860, vacated, because of the fraud and irregularity; 2. the sale of Bridgers annulled, because he bought with full notice of the alleged fraud; and 3. the sale by Bridgers to Wilkes annulled, because Wilkes bought with like notice of the same fraud. He does not seek to *ratify* the sales, or either of them, and take the proceeds, not even the sale to the defendant Wilkes, at the large price of one hundred and fifty thousand dollars ($150,000), of which only ten thousand dollars ($10,000 have been paid,) though that price vastly exceeded its true value when the suit was brought.

It is unquestioned law, that if one holding land in trust for another sell it to a *bona fide* vendee without notice, the vendee acquires a good title. If the price be paid before notice, there is no redress against him. If it be unpaid he may be decreed to become the debtor of the *cestui que trust*. This is a *legal* confirmation of the sale.

If a trustee, without power of sale, sell to another with notice of the trust, the *cestui que trust* may annul the sale and restore the legal title, or he may ratify the sale and take the proceeds. If part of them have been paid to the trustee, the *cestui que trust* may ratify the sale and take from the purchaser such part of the proceeds of sale as have not been paid to the trustee, and demand of the trustee the *amount received by him*.

If the only sale had been the one made to Bridgers, and that was unlawful and with notice, and he had paid to the trustee one-half the price, the *cestui que trust* might confirm

the sale, and hold the trustee and Bridgers each responsible for one-half.

If Bridgers fraudulently bought, with notice of a superior right in the plaintiff or his assignor Hovey, and then sold with like notice to the defendant Wilkes, the plaintiff might treat Bridgers as his trustee, confirm the sale to Wilkes, and become entitled to all its proceeds. If, therefore, the sale to Bridgers be confirmed by the plaintiff, Bridgers would acquire an absolute title, and the plaintiff might demand of Bridgers so much of the price as was unpaid, and would be entitled to demand of the defendants, Bynum and Grier, the amount paid to them by Bridgers; and when he (the plaintiff) came to adjust his indebtedness to them, he might claim the amount received by them as a credit on the trust debt.

Let us proceed one step further. Suppose Bridgers had bought, with notice of a superior equity in the plaintiff, the plaintiff might place him as the plaintiff's trustee in the seat of Bynum and Grier; then suppose Wilkes had bought with like notice, the plaintiff might ratify the sale to him, Wilkes. In so doing the result would be, that the plaintiff would occupy the place of Bridgers, and be entitled to receive from the defendant, Wilkes, one hundred and forty thousand dollars, ($140,000.) and from Bridgers the ten thousand dollars paid to him. Bridgers would be entitled to a return of the sum of thirty thousand dollars ($30,000) paid by him to Bynum and Grier, and the plaintiff to the whole estate on paying the debt secured by the plaintiff. So that the account would stand thus:

Amount of Wilkes' purchase,	$150,000
Deduct amount of trust debt,	40,000
Due to the plaintiff after paying the entire debt, without reckoning profits or rents,	$110,000

It is manifest, from this view, that if the plaintiff's averments be true, he might confirm the sale to Wilkes, pay the mortgage debt due to Bynum and Grier, and have left a net debt against Wilkes of one hundred and ten thousand dollars,

($110,000,) secured by the lands. But, instead of *ratifying* the sale to Wilkes, which would be accompanied by such golden results, he seeks to set it aside and have "*a conveyance of all the High Shoal property, upon satisfying the lien of forty thousand dollars* ($40,000) *with interest,*" and thus liberate Wilkes from his heavy debt. This is conclusive proof that the suit is instituted for the benefit of Wilkes, and that the title is not impeached by an *injured* man, as is alleged in defendant's answer. (Rec B. 1, 41.)

II. It cannot be pretended that Bridgers was actually informed of any defect of title, and redress is sought against him only on the ground that as a prudent man he had constructive notice by notice of those evidences of defect of title which a prudent man would be bound to hunt up in the investigation of title.

Assuming it to have been his duty to make inquiry of the title, and that he saw all the registered and other written evidence of it, let us see what it is: First, the deed of January 1, 1859, of Bynum and Grier to Hovey; second, the deed of the same date from Hovey to Bynum & Grier, in trust; third, the surrender of Hovey by deed of the 24th May, 1860, witnessed by Wm. Sloan, the purchaser at the sale of the 28th April previous. (See Record 25.) He could not possibly have had any knowledge by consulting the records of any title in the plaintiff. (Alcott.) He is, therefore, an innocent purchaser without notice, and the cause of the want of that notice is the gross negligence of the plaintiff in not having his assignment from Olcott registered. He comes, therefore, into Court with unclean hands.

III. The sale of 28th April, 1860, was strictly in accordance with the conditions of the deed in trust of January 1, 1859, made to secure, not the corporation, but the *stockholders* of the High School's Manufacturing Company. The several times of payment, and the sums to be paid at each time, are clearly specified; and it is provided (Rec. 18, 19) that if "*default shall be made in the payment of the said sum of money,* "*or the interest that may grow due thereon, or of any part* "*thereof, that then, and upon failure of the grantor to pay the*

"*first or any subsequent installment, as hereinbefore specified, it* "*it shall be lawful for the trustee to enter upon all and singular* "*the premises hereby granted, and to sell and dispose of the* "*same, and all benefit and equity of redemption, &c., and to* "*make and deliver to the purchaser or purchasers thereof a good* "*and sufficient deed for the same, in fee simple, and out of the* "*money arising from such sale to retain the principal and inter-* "*est which shall then be due on the said bond or obligation, to-* "*gether with the costs and charges of advertising and sale of* "*the same premises, rendering the overplus of the purchase* "*money, if any there shall be, unto the said Hovey,*" &c.; "*which sale so to be made shall forever be a perpetual bar,* "*both in law and equity, against the said Hovey, his heirs and* "*assigns, and all other persons claiming the premises, or any* "*part thereof, by, from, or under him, them, or either of* "*them.*"

It will be noted that the "*bond*" referred to, is the penal bond of $80.000, which becomes forfeited on non-payment of any one of the installments specified therein.

The object of the provision to sell was to insure compliance with the contract in each and all of its terms. Upon the breach of payment, the provision is that the land conveyed—not a part of it, but the whole of it—shall be sold No one of the parties had the power to sell the estate otherwise than as stipulated Neither Hovey nor his alleged assignor interposed any dissent against the sale in *solido* or for cash. The letter of Olcott & Stephenson of 25th February, 1860, (Rec. 105, 106,) admits notice of the intended sale, and the right to sell according to the terms and for cash ; and the only request made by them in respect to the sale, is the favor to postpone it till the first of May, which was granted. (Rec. 54, 55, 82; *advertisement*--Bynum's dep. 100, *et seq.*)

But it is too well settled to need authorities that a naked power to sell, is a power to sell for cash only.

Upon the question of notice of the time of sale of April, 1860, to Olcott & Stephenson, and the action thereupon of the parties and their agents, Darling and Hovey, as also upon the propriety of selling *in solido*, the attention of the Court is

directed to their depositions, taken without cross-examination, (Rec. 56 to 78, as contrasted with the depositions of Bynum, Sloan and White, subjected to a rigid cross-examination (Rec. 84 to 93; also, 100 to 112.)

In several important particulars the witnesses differ in their evidence; and it is worthy of note, that all the depositions and affidavits taken by the plaintiff are taken *ex parte* without notice to the adverse party of the time and place, and without submitting the proposed interrogatories to the defendants so as to allow a cross-examination, while the plaintiff had full notice and opportunity, and availed himself of it, to cross-examine the defendant's witnesses. (Rec. 47, 54, 65, 83, 60, 103, 108 and 111.)

IV. Fraud cannot be attributed as the motive of the April sale, because of the pressing reasons for it. The vendors, Bynum & Grier, saw that the property was becoming more and more ruinous every day, and they had the dreary prospect before them of being disappointed of the the hopes of payment to the last, and then finding that their property greatly depreciated in value must again be thrown upon the market. They were acting as trustees for others, and surely it was their imperative duty to use whatever means they had in their power for the benefit of their *cestuis que trust*. Anticipating that they might be in such a condition when the first instalment should became due, they had it expressly provided in the deed in trust which they took, that they might sell the whole property upon the failure of the purchaser to meet his first payment. Was there any thing unlawful or inequitable in that? We contend that there was not. It was the solemn agreement of the parties, and they all being *sui juris* are bound by it. See 1 Washburn on Real Property, 498 page, (1st Ed., and Notes, *James* v. *Thomas*, 5 Barn & Adol 40, (27 C. L. Rep. 26.) Coote on Mort. 128, (18 Law Lib 56,) Cruise's Dig. Tit. Mortgage. ch. 6, and Greenleaf's note thereto.

The trustees having thus the power of sale under the deed which, Hovey, the purchaser gave to secure the purchase money, made the sale fairly and openly and in every way accord-

ing the requirement of law. They delayed the sale until the 28th day of April, 1860, although the default in the payment of the instalment had occurred on the 1st of the preceding January. They wished to sell earlier than that time, but they postponed it at the express request of the plaintiff and others who expressed a wish to be present. They fixed the time within three days of the time mentioned by those parties, and they could not postpone it longer without great inconvenience to themselves. They sold the property *in solido* because it was advantageous thus to sell it, and it had always been dealt with in that way, and they were authorized to do so by the terms of the mortgage deed under which they acted. (Record 112.) They sold for cash, because they had no right to sell upon a credit, unless it had been so stipulated in the deed, or their *cestui, que interest* had agreed that they should sell otherwise. They sold upon the premises as it was their duty to do, unless another place had been fixed upon in the deed. The place of sale was a public one, well known to be such in all the surrounding country, and, in fact, there were many persons present, several of whom were able to have became purchasers had, they wished to buy the property. (Record 42.) And lastly, the grantor in the deed in trust and several of his friends were present and made no objection to the sale then or afterwards. So far from it, the grantor, Hovey, executed a solemn deed of surrender on the 24th May, 1860. And afterwards, in the Spring of 1861, the plaintiff himself came from the North, visited the property, made no claim to it, but on the contrary on the 16th April, 1861, he actually took a lease of Bynum of a part of the land, thereby acknowledging by a solemn act their title to it.

But it is objected that Sloan, the purchaser, at the sale of April 28th, 1860, did not then take a deed from Byuum & Greer, and that they continued to deal with the land as if they were still the owners. That admits of a fair and satisfactory explanation. Sloan purchased for the stockholders of the High Shoals Manufacturing Company for whom Bynum & Greer were acting as the trustees or agents, and the stockholders, having perfect confidence in their prudence and inte-

grity, were desirous that they should continue so to act. They ultimately, on the 12th of June, 1868, did execute a deed to Sloan, which, by a well known rule of law related to the day of his purchase and gave him a title from that time. *Patton* v. *Cooper*, Cook Rep. 133; 1 Bright Fed. Dig. 254. pl. 98

V. The plaintiff cannot read the registered copy of an original deed lost and never registered. The legislation of the State from 1715, affirms this position

The act of 1715, (Rev. Code, Chap. 37, Sec. 1.) which superseded all other modes of conveying real estate, expressly declares, that "no conveyance for land shall be good and available in law, unless the same shall be proved and registered in the county where the land lie"

The act of 1846, (Rev Code, Chap 37, Sec. 16.) which first allowed the copy of a deed to be read in evidence, embraces only "the registry or duly certified copy of the record of any deed" duly registered.

The act of 1854, (Rev. Code, Chap 44, Sec. 14,) which allows the presumption of a fee simple estate conveyed by a lost deed, embraces such deeds only as shall have been registered. See *Patton* v. *Reilly*, Cooke 119; *Patton* v. *Brown*, *ib* 126

Indeed, it is expressly decided by the Supreme Court of North Carolina, that registration is as essential to the transfer of a land title, as was livery of seisen at common law, *Hogan* v. *Strayhorn*, 65 N C. 279; *Ivey* v. *Granberry*, 66 N. C. 224; *Watson* v *Dobbins*. 1 Bright. Fed. Dig. 255, pl. 125.

This registration which the law makes essential to a deed, must be of the original deed and not of a copy It is true that after the original is put upon the register's book, a copy may be used when the original is proved to be lost, because the title has already passed by the registration; but when it is lost before registration, it can only be supplied by a suit in equity directly for that purpose against the grantor, or in case of his death, against his heirs or devisees, and a decree against them compelling them to execute a new deed. 1 Storey, Eq. Sec. 88. Hodges vs. Hodges, 2 Dev. & Bat. Eq. 72. Plummer vs Baskerville, 1 Ire. Eq. 252. McCaine vs. Hill, 2 Ire. Eq. 176. The case of Hodges vs. Hod-

ges is directly in point, the bill being dismissed because it was not properly framed, and the same objection applies to the present bill In the present case the pleader proceeds throughout upon the supposition that the registered copy of the unregistered deed under which the plaintiff claims was admissable as secondary evidence after proof of the loss of the original, and he does not ask that his alleged grantor shall execute another conveyance.

The propriety of this rule of law, that a deed lost before registration can only be established by a suit for that purpose, in which all persons concerned should be made parties is apparent, and fully illustrated by the established facts of this case. Thus, if Hovey were plaintiff, his alleged equity would be fully met and overthrown by his deed of surrender of the 24th day of May, 1860, by which he would be estopped. The plaintiff seeks to avoid that estoppel by claiming under a prior deed from Hovey of the 8th of January, 1859 This deed from Hovey is the hinge of the plaintiff's rights, without it he is utterly disarmed. When therefore he seeks to establish it as a conveyance of the same property, it is indispensible that all persons who may be affected by such conveyance should be made parties, and have an opportunity to contest its establishment By the laws of North Carolina regulating the transfer of real estate there must be, first, a deed in proper form, and secondly a registration of that deed. Each of these is equally essential to the transfer of title. There is no law authorizing the registration of a copy. When, therefore, the original unregistered deed has been lost, the title remains in the alleged vendor, unaffected by any deed. Now it is clear that no legal owner of real estate can be divested of his title without making him a party in the controversy to supply the deed by a new one, and this new deed must be executed by the vendor if living, and by his heirs or devisees if deceased.

VI. But the plaintiff contends, finally, that if his registered copy were properly rejected by the Court, then his bill can be supported upon the ground of a resulting trust established by

parol proof. We deny that there is any sufficient proof to establish any such case for relief. But if there were, he is met by the fatal objection that his allegations do not correspond with his proofs. His bill is not framed upon any such grounds, and it is a well settled rule in equity that a plaintiff cannot have relief except upon the grounds on which he has placed his claim. It is so said expressly in *Craige* v. *Craige*, 6 Ired. Eq. 191, and there are several other cases in the North Carolina Reports to the same effect. See 3 Battle's Digest at page 494.

We conclude, then, that there is no error in the decree of the Circuit Court

B. F. MOORE,
WILL. H. BATTLE,
Solicitors and Counsel for Defendants.

2 Dev Eq 152

Bell v [illegible]

Cook's Eq Dig p. 110

65 NC 279

Dep't Justice

66 NC 229

17-64
10 Wallace 543

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1872.

No. 8.—ORIGINAL.

EX-PARTE IN THE MATTER OF HENRY C. WARMOTH, GOVERNOR, ETC., PETITIONER.

PETITION FOR WRITS OF PROHIBITION AND CERTIORARI.

FILED DECEMBER 10, 1872.

Dec. 10, 1872

U.S. Supreme Court

1 Wall 406

24 How 66

2 Doria Eq 157

1 To the honorable the Chief Justice of the Supreme Court of the United States, and the associate justices thereof:

The petition of Henry C. Warmoth, governor of the State of Louisiana, with respect represents:

That your petitioner is, and has been, since the year 1868, governor of said State of Louisiana, duly elected, qualified, and in possession of said office, and the discharge of its duties.

That, by the constitution of the said State, "the supreme executive power of the State is vested in a chief magistrate, who shall be styled the governor of Louisiana."

That a general election was held in said State, on the fourth day of of November last, in pursuance of the then existing statute of the State, to wit, the law of 1870. That, by such law, it was made the duty
2 of the supervisors and assistant supervisors of registration throughout the State, immediately after the votes had been counted at the places of counting, respectively, to inclose the statements or returns of such counts to your petitioner, as governor of the State.

That the said officers discharged their duties, and such statements were sent to your petitioner, as governor of Louisiana, and your petitioner was and is ready to discharge his duty as governor by submitting said statements or returns to the proper board of returning officers provided by law, to the end that said returns might be duly canvassed and the correct results legally announced.

That, on the 16th day of November, 1872, one William P. Kellogg, a citizen of the State of Louisiana, alleging himself to have been a candidate for the office of governor of Louisiana, at said election, filed a bill in the circuit court of the United States for the district of Louisiana, in equity, in which (while admitting, as your petitioner is advised and believes, that he had been defeated, and that a correct addition and canvass or compilation of said returns would show such defeat,) he made your petitioner a party defendant, with others, detailed the du-
3 ties of your petitioner as governor under the election law; and alleged that your petitioner had, in certain detailed respects, violated his duties as governor, and in certain other respects come short of the performance of said duties as governor, as will more fully appear by reference to the printed transcript of proceedings hereto annexed, and herewith presented, and especially at pages 1 to 9, inclusive.

That, in the prayer of said bill, the said Kellogg prayed that your petitioner might be enjoined and restrained from performing his official duty as governor in respect of said statements and returns, and from exercising his official judgment and discretion according to his oath of office in respect of the same. That said complainant also prayed that your petitioner, as governor, might be ordered within a period of
4 time to be fixed by the court to prepare and file in court sworn copies of every paper which he had, as governor, received from the supervisors of elections as aforesaid.

That, as your petitioner is advised and believes, the said Kellogg claims in said bill that, though defeated by an accurate compilation of said returns, yet that enough voters were illegally refused a right to vote at said election to have given him a majority if they had voted and voted for him.

That the prayer of said complainant Kellogg is set out at pages 10 to 13, inclusive, of the record annexed.

That, on the 16 day of November, 1872, the Honorable Edward H.

Durell, district judge of the United States, sitting as one of the judges of the said circuit court, granted an order to show cause why injunctions should not issue *pendente lite* against your petitioner, as gov-
5 ernor as aforesaid, and directed that restraining orders to the same effect should issue as prayed for in the bill of complaint.

That such restraining order was issued on the same day, whereby your petitioner was enjoined and restrained from the further performance of his duties as governor in the premises, as will more fully appear by reference to the annexed record at pages 14 to 16, inclusive.

That, on the 19th November, 1872, the said judge of said court
6 granted an order to show cause why your petitioner should not be punished for contempt, for having disobeyed said restraining order by acts meantime as governor, and requiring him to answer interrogatories in regard to what he had done as governor of Louisiana in the premises, as will appear by page 17 and pages 50 to 52 of said annexed record, and the answer thereto at p. 64.

That the said motions for injunctions to restrain the official action of petitioner, as governor of Louisiana, and to punish petitioner for contempt, for having done certain acts as governor of Louisiana, which acts, it is pretended, are in violation of said restraining order, have been entertained by the said judge of said circuit court, and evidence taken, and argument in part had; and your petitioner has reason to fear,
7 and does fear, that the said judge will make orders in the said case, to enjoin and imprison your petitioner, & will attempt thus to compel petitioner, as governor, to perform, or refrain from performing, official acts.

Now your petitioner shows, that, as to your petitioner, in his capacity of governor, and so far as the said proceedings claim to interfere with, control, or compel his official action, the said circuit court is wholly without jurisdiction under the Constitution of the United States, and can have no jurisdiction conferred on it by statute; that such proceedings against your petitioner, as governor, are a suit against the State of Louisiana, and, if maintainable at all, can only be brought in the honorable the Supreme Court of the United States; that the entertaining of such suit is not only an exceeding of the jurisdiction of the said
8 circuit court, but an infringement upon the jurisdiction of your honorable court, and that your petitioner is entitled to a writ of prohibition to prevent the said judge from further proceeding in the case; that your honorable court has jurisdiction to grant the said writ.

Wherefore your petitioner prays that your honorable court will be pleased to grant a rule to show cause why a prohibition or writ of certiorari should not issue to the said circuit court of the United States for the district of Louisiana, and to the Hon. Edward H. Durell, as a judge of said court, forbidding the said court and the said judge from further proceeding in said cause, or commanding them to send a certified transcript of said proceedings forthwith to this hon. court, to be proceeded with here according to law; that, after due proceedings had, the said prohibition or certiorari may be issued and made perpetual
9 and that in the meantime and until the further order of this honorable court the said circuit court and the said judge be forbidden to proceed further in the said cause; and for all other and further relief, as law and justice may require.

H. U. OGDEN,
Att'y-Gen'l of La., of Counsel.

Henry C. Warmoth, governor of Louisiana, being duly sworn, says that he has heard the foregoing petition read, and that the same is true.

H. C. WARMOTH.

Sworn before me this 5 day of December, 1872.

[SEAL.]

WM GRANT,

United States Com'r, Dist. of Louisiana.

16. St. v. 140 —
Sunday on prohibitory
20 Mo. 574-579
5 Cal. 295 Peoples
Green —
A Hale Cox
Dudley admrs
Pratten for Plff
2 Douglas 605 —
3 Dallas, 175, 2 Peters
3 How 322.
1 Black 604 Pacific Railroad

Supreme Court of the United States.

DECEMBER TERM, 1872.

Ex parte
H. C. Warmouth. } Petition for Prohibition.

Brief of Argument.

P. PHILLIPS, *of Counsel for Applicant.*

The present application for the writ of prohibition is founded on the assumption of jurisdiction by Judge Durell, sitting in New Orleans as circuit judge for the fifth circuit and district of Louisiana, on a bill filed on the equity side of the court, wherein W. P. Kellogg is complainant, and Henry C. Warmouth, Jack Wharton, Frank H. Hatch, Durant da Ponté, John McEnery, and the New Orleans Republican Printing Company, are defendants. All the parties, both complainants and defendants, are averred to be citizens of Louisiana.

The bill shows that on November, 1872, an election was held for Governor and Lieutenant Governor, as well as for officers of the executive, judicial, and legislative departments; that complainant and McEnery were opposing candidates for Governor; that at said election no one was enabled to vote who had not registered; that the appointment by Warmouth of the supervisors of registration was with the fraudulent intent of preventing persons entitled to the franchise from registering, and that in fact a large number, estimated at 10,000, were on frivolous pretences prevented from registering, and thus preventing them from voting for the complainant; that the said Warmouth, combining with the supervisors and assistants, has caused a false count

to be made of the votes, and given untrue returns and certificates of election; that in counting the votes and issuing certificates he has not complied with the law of the State; that he illegally appointed Wharton Secretary of State, and with him elected Hatch and Da Ponté members of the returning board; that it is the intention of this board to make a pretended canvass of the votes, so as to exclude from the count the votes of persons of color prevented from being cast, and thus to deliver to the pretended Secretary of State such certificate of result as to make it appear that the said McEnery is elected, which would embarrass and delay him in the prosecution of legal proceedings in this court, (circuit;) that he believes it to be the intention of Warmouth, to mutilate said certificates and returns, and that they should be preserved for proper action when the time for such action shall arrive.

The bill then prays for an injunction, restraining defendants from canvassing any return or certificate, or submitting the same to the pretended board, composed of Wharton, Hatch, and Da Ponté.

That an injunction issue to McEnery, prohibiting him from acting as Governor, or setting up any claim to the office.

That an injunction also issue to the New Orleans Republican Printing Company, controlling the publication of the New Orleans Republican, restraining it from publishing any notice, statement, or document relating to said election, and emanating from said board.

The bill further prays, that Warmouth deposit with the clerk sworn copies of all the papers relating to the said election, in order that they may be beyond his power of destruction.

Further, that the writ of injunction may be granted in the first instance *pendente lite*, and after due proceedings be made perpetual.

The bill was filed on 16 November, 1872, and the injunctions, as prayed for, were issued and served on 17 November. (Pp. 14, 15, 16.)

Subsequently proceedings in contempt were instituted against some of the defendants for violating the injunction, and since this petition was dated the following order or decree has been issued:

"In order to prevent the further obstruction of the proceedings in this cause, and further to prevent the violation of the orders of this court to the imminent danger of disturbing the public peace, it is hereby ordered, that the marshal of the United States, for the district of Louisiana, shall forthwith take possession of the building known as the Mechanics' Institute, and occupy the State House for the assembling of the Legislature there in the city of New Orleans, and hold the same subject to further order of this court; and meanwhile to prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said pretended returning officers in contempt and violation of said restraining order. But the marshal is directed to allow the ingress or egress to and from the public office in said building of persons entitled to the same."

Act of 1870.

This proceeding, without a precedent, which virtually submits to a district judge the question of the validity of a State election for the Legislature, executive, and judiciary, and calls for his decision as to which of the contesting parties are entitled to wield the functions of government, is sought to be upheld by the act of Congress 31 May, 1870. (16 Stats., 140.)

On the constitutionality of this act we forbear to speak. The exigency of the case does not demand the discussion.

The 2, 3, 4, 5, 6, 19, 20 sections are intended to preserve the right of the voter. Each relates to a specific wrong against him, and constitutes it a misdemeanor, punishable by fine and imprisonment.

The 23 section gives a remedy to one deprived of his election to any office. The remedy is to consist in "*any appropriate suit or proceeding to recover possession of the office.*"

The appropriate proceeding for recovering possession of

an office is well known, in the use of an information in the nature of a quo warranto and the writ of mandamus.

This bill is not for the purpose of *recovering possession*, but seeks in a federal court for a determination of the numerous questions which are presumed to relate to the fairness and regularity of the action of all the State officers, from the Governor down to an assistant supervisor. That is, a district judge is called upon to decree that the laws of Louisiana in reference to elections have not been faithfully carried out by the officers and agents of the State, to whom their execution has been intrusted by State provision, constitutional and statutory. This, too, on bill which avers that complainant and defendants are all citizens of the State of Louisiana.

Remedy.

The question now recurs, has this court any authority to issue a restraining order to the district judge for the purpose of arresting the further progress of the usurpation which threatens the State with chaos and revolution?

The constitution vests the judicial power of the United States in one "supreme court" and such "inferior courts" as Congress may ordain and establish. The courts thus established are not "inferior" in the sense that their functions are unimportant; but in this sense only, that in the exercise of their jurisdiction they are *subordinated* to a higher tribunal.

Out of the relation thus constitutionally established there necessarily arises an authority on the part of the superior to see, on the one hand, that the inferior court exercises the jurisdiction conferred on it by the law, and on the other that it does not exceed the boundaries of jurisdiction which the law has prescribed. This is effected by writs known as "mandamus" and "prohibition."

Lloyd on Prohibition, p. 3.
Quimbo *v.* People, 20 N. Y., 540, 549.
Sikes *v.* Ransom, 6 John., 279.
Ex parte Crane, 5 Pet., 194.

The necessity for the use of the writ of prohibition is so imperious, especially under our complicated system of political and judicial machinery, that it would certainly be a most startling announcement if it should be finally determined that Congress has by act taken away the right to issue the writ, or what is the same thing, denied to the court the authority to restrain the inferior courts from usurping jurisdiction.

This court is armed with the power of restraining the highest courts of the States and confining them to their jurisdiction; can it be supposed that the same act which confers this great power intended to free the "inferior courts" from all restraint, and to allow their usurpations to stand unredressed?

The act of 1789.

We come now to inquire as to the just interpretation of the 13 section of the judiciary act.

After providing that the Supreme Court should have appellate jurisdiction from the circuit court, it is added, "and shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty, and writs of mandamus, in cases warranted by the principles and usages of law to any courts appointed or persons holding office under the authority of the United States."

Was the designation of the particular court and the particular jurisdiction intended to exclude this tribunal from the use of prohibition as to all other courts and all other jurisdictions?

The maxim *expressio unius* is not of universal application, and will not be permitted to defeat the intention of the legislature, and produce an anomaly in legislation and the obliteration of the lines of jurisdiction.

In using the express words that a prohibition might be sent to the district court when exercising admiralty jurisdiction, Congress intended to settle the difficulty which in England had existed over a century between her admiralty

and common-law court, in which the right of the latter to send to the former the writ of prohibition had been fought over by the keenest legal intellects of the land. The decisions on this question reached down to 1781, and are found reported in Lecaux *v.* Eden, and Lindo *v.* Rodney, 2 Doug., 605.

The history of the long struggle between these rival courts may be seen in Dunlap's Adm'y Practice, from page 11 to page 31.

The jealousy of the common-law courts of the admiralty jurisdiction was inherited by the framers of the act of 1789; and, determined not to leave it uncertain, they used express terms to subject it to this writ.

But to suppose that they intended to deny to the court the right to issue the writ in any other way than thus prescribed, we must conclude they intended to produce this most anomalous result, to wit, that in the only case in which there had been judicial doubt and stern denial of its rightful use, the act granted it; while in that numerous class of cases in which it had been issued time out of mind without denial, the act prohibited it.

Again, following the writ of "prohibition" is the authority to issue the writ of "mandamus." These writs are of the same class, and are the complement of each other.

Could the legislature have regarded it as of more importance to command the superior courts to proceed, than to restrain them from overstepping the boundaries of their jurisdiction, and yet it is beyond a peradventure, that the mandamus extends *to all courts and all kinds of jurisdiction.*

But we advance to the 14 section, in which power is given "to issue writs of *scire facias*, habeas corpus, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

We claim that, under the description "*all other writs*," the prohibition may issue; for the writ as applied to com-

mon-law cases, and to courts other than the district court, had not been "specially provided for by statute."

What is the meaning of the descriptive limitation "necessary to the exercise of their respective jurisdictions?" So far as this court is concerned, this jurisdiction may properly include its supreme right of controlling the inferior courts, and any writ necessary to keep these courts in subordination may, in a just sense, be regarded as necessary to the exercise of its jurisdiction.

How is the supremacy of the one court, and the inferiority of the other, ordained by the constitution, to be maintained, if the inferior courts can pass beyond the law's limits without power of restraint here?

The use of the writ cannot be dependent on the right of the court to entertain a writ of error or appeal in a given case, for the writ is founded in the denial of any jurisdiction in the inferior court.

There is no writ of error or appeal in criminal cases, yet the habeas corpus is used to discharge from false imprisonment.

So mandamus has been used to restore an attorney disbarred for a contempt of court, on the ground of the want of jurisdiction in the court pronouncing the sentence.

And in frequent cases where judgments and decrees are rendered without jurisdiction, this court exerts its revisory power so far as to reverse the same and direct the proceeding to be dismissed.

THE DECISIONS OF THIS COURT.

The rules for ascertaining what is to be considered as judicially settled in an opinion is believed to be uniformly recognized as follows:

A judicial opinion is one which is given on a question actually involved in a matter brought before the judge for his decision. An extra-judicial opinion is one which, although given by a judge in deciding a case, is not necessary to the judgment, and, whether given in or out of court, is no more than the prolatum of him who gives it, and has no legal efficacy. (Vaughn, 382.)

The first case of prohibition is that of the United States *v.* Judge Peters, (1 Dall., 124.) The district judge was proceeding in admiralty, so that the case fell within the express words of the 13 section. It is to be remarked that the argument, which was made in 1795—that is, but four years after the passage of the act—by such counsel as Ingersoll, Duponceau, and Dallas, found the right to the writ not in the words of the 13 section, but in the "superintending authority deposited in the Supreme Court by the Federal Constitution."

The writ was granted, and no opinion of the court was pronounced.

This was followed by Ex parte Christy, (3 How., 322,) where the writ was sought to be applied to the district court in bankruptcy, on the ground that it was exceeding its jurisdiction. Judge Story elaborately reviewed the matter, and decided that the district court had not exceeded its jurisdiction.

This was decisive of the application, but the judge, though stating that it was not necessary to decide whether the court had the power to issue the writ, did go on to say, that he knew of no case where the writ could be used except as provided for in the 13 section.

This expression of opinion constitutes the sole authority upon which the two following decisions are based:

Ex parte Gordon, 1 Bl., 504.

Ex parte Graham, 10 Wall., 543.

In the first case the applicant for the writ had been convicted for piracy, and the warrant had been issued to the marshal to carry it into execution. The petition for the writ did not pretend that the court by which he had been convicted had exceeded its jurisdiction, but placed his application on the ground that "there were *irregularities and errors* in the proceeding against him."

Upon the face of his petition he was not entitled to the writ, but the Chief Justice quotes the remark of Story, J., in *Ex parte* Christy.

In the second case it was shown that the district court,

within its jurisdiction, had condemned certain confiscated property. After condemnation, the owner was permitted to file a proceeding to review that condemnation. This court was applied to for a "prohibition" to prevent the judge from acting on that proceeding for review.

But the court held that the jurisdiction had not been exceeded—

"That the supplemental case was but an elongation of the original case, and necessarily of the same nature and jurisdictional character."

"If (say the court) the district court should *err* in the proceeding upon the libel of review, the remedy will be by writ of error."

In all three of the cases, the court below was held to have had jurisdiction. This was all that need to have been said in denying the writ.

There is no case that has been presented before the one now on hearing where the application was based on the express ground that the inferior court was usurping jurisdiction.

The importance of the question thus raised cannot be overstated, and the present case is its fullest illustration. Without attempting to pass upon the relative merits of the parties to the controversy, we have here the machinery of an inferior federal court invoked to take out of the hands of the officers and agents of the State, intrusted to conduct a State election, the powers vested in them by the constitution and laws of the State, and to transfer power from those who are certified to have been elected, to those who claim they ought to have been so certified. If this be tolerated, State governments in all its parts—executive, legislative, and judicial—exist but in name. In the extinction of State governments the Federal Union expires.

Is there no redress for such judicial usurpation? The writ of error or appeal, after final judgment in such a case, is but a mockery of justice. To be effectual, the remedy must be preventive. P. PHILLIPS.

11 DECEMBER, 1872.

ARGUMENT

OF

THOMAS J. SEMMES, Esq.,

IN THE CASE OF

WM. PITT KELLOGG

vs.

H. C. WARMOTH, Governor of Louisiana, and others.

Before the Circuit Court of the United States for Louisiana, on Tuesday, the 26th of November, 1872, on a rule nisi, to grant an injunction under the Enforcement Act of 1870, and the amendments thereto.

REPORTED BY C. W. COLTON, Phonographer.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Circuit Court of the United States.

New Orleans, November 26, 1872.

WM. PITT KELLOGG
v.
H. C. WARMOTH, *et als.* } No. . In Equity.

ARGUMENT OF T. J. SEMMES, ESQ.

May it please your honor, I cannot help feeling gratified at the course which your honor, with that sagacity and intelligence with which justice is administered in this court, adopted in taking the view that the rule for contempt should await the argument upon the merits of this cause; because your honor, as a very well-educated lawyer, foresaw that, under the established rules of chancery practice, even if the parties had been guilty of the alleged contempt, if the order should be revoked which had been granted on the hearing, the contempt would necessarily fall with the revocation of that order; as it is well known in chancery that the dismissal of the bill revokes the rule for contempt. This was decided by the Supreme Court of the United States itself in the great case of the Wheeling bridge. There an injunction had been granted, directing that the parties engaged in the construction of the Wheeling bridge should cease to go on with it. Nevertheless, during the adjournment of the court, they persisted and constructed the bridge. When the court met, an act of Congress in the meanwhile having been passed which legalized the construction of the bridge, the question came up whether the court would or

would not punish these parties for constructing the bridge in violation of the injunction. By a divided vote they refused to punish for contempt upon the ground that, the act having been legalized, they had no authority to punish for the act which had been done, and which at the time that the application for punishment was made was legal. So, in the courts of New York a decree was granted enjoining a party from doing an act; he violated the injunction pending an appeal; on appeal the judgment was reversed, and the court then refused to punish for contempt after the reversal of the judgment, the legal principle being that, if at the time that the person is to be punished the order or decree of the court is revoked or the suit dismissed, the contempt, if any, ends and ceases to exist. Therefore, I say it was very proper for your honor to do as you have done—to await the argument of this case upon its merits, as to the granting or non-granting of this injunction, before you would act upon the question of contempt.

The preliminary question, may it please your honor, in regard to the jurisdiction of the circuit court of the United States over the subject-matter of this case, in so far as it is presented by the bill, requires a slight analysis of the bill itself in order to ascertain what the case is, what object is had in view by the case as presented in the bill, and what relief is sought for by it. Now, sir, what are the allegations in the bill? That ten thousand persons of color, entitled to registration under the laws of this State, were, prior to the election, refused registration, on the ground of race, color, and previous condition of servitude, and thereby, in consequence of the refusal of the right of registration, they were deprived of their votes; and that these ten thousand voters thus refused, if they had been registered, would have voted for the complainant in this bill as candidate for Governor; and the further allegation is, that the evidence of the refusal of the right to vote of these ten thousand voters thus refused registration has been preserved by virtue of the provisions of the act of Congress approved in May, 1870.

The next allegation is, that the supervisors of registration have suppressed a sufficient number of votes, which if they had not been suppressed would have been adequate to the election of Kellogg, the complainant in this bill, as candidate for Governor. But, if I have read the bill right, the votes suppressed are not alleged to have been suppressed on the ground of race, color, or previous condition.

The next allegation in the bill is, that through the instrumentality of an illegal board, consisting of F. H. Hatch, Durant DuPonte, and Jack Wharton, unlawfully elected in the manner described in the bill, the Governor desires to fraudulently do—what? The object of creating this fraudulent board, according to the allegations of the bill, is to do the only thing which the board of canvassing officers could do to affect the election; and that is, to exclude the votes of certain parishes, upon grounds stated in the election bill—on the ground of the voice of the said parishes not being fairly heard, on account of intimidation, or violence, or tumult. The allegation, therefore, is not that this fraudulent board is going to exclude the votes on account of race, color, or previous condition, because such allegation could not be made; it would be utterly impossible. When the commissioners are called on for the purpose of examining the question whether, on the ground of fraud, intimidation, or violence, a certain poll should be excluded, necessarily the whole poll is excluded, white and black, and the allegation could not be made, and has not been made, that the object of the Governor was to exclude votes which had been deposited, on account of race, color, or previous condition. What remedy does the bill ask? It asks that your honor shall interpose in this conflict between these two boards, each claiming to be the legitimate returning officers, and, by way of injunction, to determine which is the legal board, and to arrest the action of the one, and compel the Governor, who is charged under the law with the possession of the votes, to open and submit them to the investigation of the other. You are, then, called upon, by an injunction in chancery, to determine who are, and who are

would not punish these parties for constructing the bridge in violation of the injunction. By a divided vote they refused to punish for contempt upon the ground that, the act having been legalized, they had no authority to punish for the act which had been done, and which at the time that the application for punishment was made was legal. So, in the courts of New York a decree was granted enjoining a party from doing an act; he violated the injunction pending an appeal; on appeal the judgment was reversed, and the court then refused to punish for contempt after the reversal of the judgment, the legal principle being that, if at the time that the person is to be punished the order or decree of the court is revoked or the suit dismissed, the contempt, if any, ends and ceases to exist. Therefore, I say it was very proper for your honor to do as you have done—to await the argument of this case upon its merits, as to the granting or non-granting of this injunction, before you would act upon the question of contempt.

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not, the legally constituted officers of the State, charged with this duty. And you are called on to do that in conjunction with and as a part of—what? Not in a case where you are called on to decree ultimate and final relief, but in a bill, only a bill to perpetuate testimony—a bill based exclusively upon the ground that Mr. Kellogg, by the state of things existing, is already defeated, and that, under the act of Congress of 1870, being defeated, he proposes to contest the election of Mr. McEnery; and before he can bring this suit as a defeated candidate, and assert his rights, you are asked to interpose, as a court of chancery, by way of a bill to perpetuate testimony, and arrest the counting of these votes by the Governor and his board, upon the allegation, unsupported by any proof whatsoever, except the allegation of the complainant in the bill, that, if you do not interpose, the Governor and all his colleagues will be guilty of the high crime and misdemeanor of altering, defacing, and suppressing these returns which have been thus made. That is the case. When I have stated the case to an educated mind in the legal profession, (and I have stated a case which concedes that the act of Congress of 1870 is constitutional, which question I leave to my colleagues to discuss,) I have stated a case not embraced within the provisions of the act; a case not within the power of a court of chancery, if it be within the provisions of the act; a case in which Congress has nowhere delegated the authority to this court to interpose, for the purpose of granting the relief prayed for in the bill.

Is it necessary, sir, for me to read the act of Congress? I suppose that almost every one, since the pendency of this important controversy, has read it. The jurisdiction of the court is avowedly based upon one section only, and that is section twenty-three:

"That whenever any person shall be defeated or deprived of his election to any office, except Elector for President or Vice President, or Delegate in Congress, or member of the State Legislature, by reason of the denial to any citizen or citizens who shall offer to vote of the right to vote, on ac-

count of race, color, or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover possession of such office; and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offer to vote on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrently with the State courts, jurisdiction thereof, so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States and secured by this act."

Your honor will therefore observe, that it is a special jurisdiction conferred upon this court, and it is unnecessary for me to refer to authorities to establish the proposition, that the jurisdiction of the courts of the United States is limited by acts of Congress, and that, although the courts, under the constitutional amendment, may be enabled to exercise a more enlarged jurisdiction than that actually conferred by the acts of Congress, yet the arm of the courts is paralyzed until the jurisdiction which under the Constitution Congress can confer is actually conferred by a specific enactment upon the courts. Therefore, in all questions before the circuit court of the United States we call upon the parties who invoke the interposition of those courts to produce an act of Congress under which those courts can exercise the constitutional functions which they propose to exercise or which the parties invoke. Now, what is the jurisdiction conferred? The jurisdiction is conferred upon the court to give relief—to whom? To a person who, being a candidate for office, is defeated or deprived of that office in consequence of the denial of the right to vote secured by the fifteenth amendment to the Constitution of the United States, to wit: the right to vote to persons being of a certain race, color, or previous condition of servitude. And

the act goes on to declare that such person may bring his suit when it shall appear that the sole question touching the title to such office arises out of the denial of this constitutional right.

Therefore, sir, I say that no case, either in law or in chancery, can be instituted in this court for the purpose of obtaining possession of a State office, except upon the sole ground that the right to the office has been defeated by the denial to citizens of the right to vote on account of race, color, or previous condition of servitude; that if there be other causes—if there be frauds practiced upon black and white, if there be votes excluded for any other cause than the cause assigned by the constitutional amendment—the court has no jurisdiction to inquire into the subject; and, therefore, the only part of this bill which the court of chancery can entertain—supposing it to be a bill which a court of chancery can entertain at all—is that part of the bill where it is alleged that citizens have been excluded from voting or registration on account of race, color, or previous condition of servitude; and if that be all and this be a bill to perpetuate testimony, upon their own statement the bill is unnecessary; and why? Because they say—and they have brought the evidence before your honor—that the evidence has been preserved under the act of Congress, and they have got the evidence in their possession and we have it not. What do they want a bill of discovery for, when they come in here and tell us "we are defeated by the rejection of ten thousand votes and we have the evidence in our possession?" And yet you are to enjoin the Governor of this State and the legitimate board from counting votes—not rejected votes, because they could not be counted; not votes the evidence of which has been annexed to these returns and to be submitted to this fraudulent board; no, but votes the evidence of which, if they be legal votes, they have already in their possession and now bring into this court where you are asked to interpose to perpetuate testimony. They say there are votes suppressed. And grant that the allegation be made that they are suppressed on account of race, color,

or previous condition of servitude, then they are suppressed; then they do not appear upon the returns; then they have not been counted; then they could not be counted; then the returns do not show these suppressed votes; then, what do you come here to discover?

You allege a fraud, not only against the supervisors of registration, (and these are the only people who are charged as combining with the Governor to accomplish the stupendous frauds stated in this bill,) but you charge a suppression of votes, which could not be accomplished except through the connivance of the commissioners of election, not appointed by the Governor, and against whom no charge has been made. You say they have suppressed votes, for they could not be suppressed in any other way. They have not counted the votes; they could not be counted in any other way but by a refusal to count them by the commissioners of election. You have alleged a fraud in which four parties must participate, the supervisor of registration as well as the three commissioners of election, without charging fraud against the commissioners of election, and you say they have accomplished the suppression of votes, which are, therefore, not stated in the returns now on file in the Governor's office. And yet you say that this court has jurisdiction by way of a bill, for the purpose of perpetuating that which the Governor could not by any possibility have in his possession. Then you say that these returns are to be manipulated, are to be altered, are to be mangled; this could not be on account of race, color, or previous condition. Who is to do this? You say the Governor and his fraudulent board, and you want testimony to perpetuate the returns as they are. Look at the law, and your honor will perceive that it is utterly impossible that this fraud should be perpetuated as alleged, and in the mode alleged, without going through the courts of all the districts of this State and destroying there the records of those courts. Section 29 of the election law of 1870 says:

"That in any parish, precinct, ward, city, or town, in which during the time of registration or revision of registra-

tion, or on any day of election, there shall be any riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, at any place within said parish, or at or near any poll or voting place, or place of registration, or revision of registration, which riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, shall prevent, or tend to prevent, a fair, free, peaceable, and full vote of all the qualified electors of said parish, precinct, ward, city, or town, it shall be the duty of the commissioners of election"—

And here there is no fraud charged against these commissioners—

—"if such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corupt influences occur on the day of election, or of the supervisor of registration, or any assistant supervisor of registration of the parish, if they occur during the time of registration, or revision of registration"—

Your honor will observe that the commissioners of election perform this duty on the day of election, and the supervisors of registration upon the day or at the time of registration—

—"to make in duplicate, and under oath, a clear and full statement of all the facts relating thereto, and of the effect produced by such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, in preventing a fair, free, peaceable, and full registration or election, and of the number of qualified electors deterred by such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, from registering or voting, which statement shall also be corroborated under oath by three respectable citizens, qualified electors of the parish: When such statement is made by a commissioner of election, or assistant supervisor of registration, he shall forward both copies to the supervisor of registration immediately on the close of the election. The supervisor of registration shall forward one copy of all such statements, whether made by himself, or by a commissioner of election, or by an assistant supervisor of registration, to the Governor, and shall deposit one copy with the clerk of a distinct court of the parish."

So, sir, we are, of course, to presume that if all these

statements have been made, which under the fifty-third section of the bill must be statements of that sort to give this returning board jurisdiction to act at all; and if Governor Warmoth should determine to destroy all of these statements, still certified duplicates are filed with the clerks of all the district courts of the State, and therefore there is no necessity to perpetuate that testimony. What is there, then, to be perpetuated? Is it the list of voters, or the count, whether fraudulent or otherwise, which has been made by the commissioners of election? The law provides for triplicates of those—one to be sent to the Governor by a special messenger, one to be sent by mail, and the third to be preserved by the commissioners of election. Therefore, there is running through the whole system a preservation of duplicates and records of all of these statements, and of all of the counts, and of all the returns; and it would be a futile act on the part of the Governor, with a view to defeat a particular candidate for the office of Governor, to resort to the crime—the high crime—with which he is charged, of the intention to manipulate these returns; and, in addition to that, to destroy and suppress them. And, sir, when you come to consider in this connection that this charge is made by a candidate for the office of Governor, and not by a candidate for any other office in the State—when in this connection and in connection with that office you come to consider the constitutional provision as to who shall be the ultimate returning board to determine the election of Governor and Lieutenant Governor—you will find that this party, before he could institute this suit, as he professes or says he intends to do, has a remedy beyond Governor Warmoth, has a remedy beyond this returning board: he must show that their action would be final and conclusive. Their action, so far as he is concerned, so far as the office of Governor and Lieutenant Governor is concerned, is in no manner obligatory upon the two houses of the General Assembly when they assemble, in pursuance of the constitution, to count the votes and decide who is Governor and who is not.

Article forty-eight of the constitution is as follows:

"The supreme executive power of the State shall be vested in the chief magistrate, who shall be styled the Governor of the State of Louisiana. He shall hold his office during the term of four years, and together with the Lieutenant Governor, chosen for the same term, be elected as follows: The qualified electors for Representatives shall vote for Governor and Lieutenant Governor at the time and place of voting for Representatives. The returns of every election shall be sealed up and transmitted by the proper returning officer to the Secretary of State, who shall deliver them to the Speaker of the House of Representatives on the second day of the session of the General Assembly then to be holden. The members of the General Assembly shall meet in the House of Representatives to examine and count the votes. The person having the greatest number of votes for Governor shall be declared duly elected; but in case of a tie vote between two or more candidates, one of them shall immediately be chosen Governor by joint vote of the members of the General Assembly. The person having the greatest number of votes polled for Lieutenant Governor shall be Lieutenant Governor; but in case of a tie vote between two or more candidates, one of them shall be immediately chosen Lieutenant Governor by joint vote of the members of the General Assembly."

Do you tell me that if this returning board, by any fraud on their part, should declare Kellogg elected or McEnery elected, both houses of the General Assembly, when they meet, would not have a right, as the constitutional board authorized to declare who is elected Governor and who is not elected Governor, to inquire into these alleged frauds, send for duplicates of these suppressed or destroyed returns filed with the clerk of the courts throughout the State, and adjudicate on this question of elected *vel non?* I want to know, if they undertook to do so, what tribunal in this land could revise their action? I admit, that if they excluded a man's vote on account of race, color, or previous condition, this court, conceding this act of Congress to be constitutional, would have jurisdiction. But what court could revise the action of the General Assembly if the election is declared upon other principles, disconnected with the con-

stitutional amendments? Here are votes alleged to be fraudulent. Here are these returns brought up which are said to have been manipulated. The General Assembly is the court of last resort. This constitutional court, the General Assembly of the State, determines all these questions, and there is no appeal from its decision, except that conferred by the act of Congress, conceding it to be constitutional, where the right to vote has been denied on account of race, color, or previous condition of servitude. Here this party brings his suit, admitting or alleging in this bill that he is defeated; and, of course, he alleges that he is defeated at the time he brings his bill, otherwise he would have no right to file his bill. Then he is defeated by the state of things which he wishes to preserve in *statu quo;* he is defeated by the state of things in the Governor's office.

Take things as they exist, take the official returns, aside from all fraud alleged in regard to matters pertaining to the returns before they reached the Governor's office. The bill proceeds upon the theory that the complainant is defeated upon these returns, therefore the destruction of these returns would not hurt him. He is now and then and there defeated. He proceeds upon the theory that he is defeated. He proceeds upon the theory that he intended to bring an action as a defeated candidate; and that, as I understand the bill, the defeat was the result of the ten thousand rejected votes, and the result of the suppression of the numberless votes which he does not undertake to define, and which he alleges have been suppressed by the commissioners of election. He not only does not undertake to define these votes, but he does not undertake to state in which parish they were suppressed. According to his allegations, in all the parishes of the State there was not to be found an honest commissioner of election or an honest supervisor of registration; but that all of them were in combination with Governor Warmoth, this Mephistophiles, who had diffused his poison throughout the whole official mind charged with the supervision of this election, and who so contaminated the soul of everybody who had charge of the

ballot-boxes, that they violated all oaths and suppressed votes at every poll, the number not given; but the allegation is made that the number thus suppressed would be sufficient to change the result. Here, then, as I said, is a defeated candidate instituting this suit, being already defeated by the returns in the office of the Governor, and whose defeat is based upon suppressed votes that are not there, upon rejected votes of which he has the evidence in his possession. And this is styled a bill in chancery to perpetuate testimony; and this is filed to preserve evidence in the possession of the Governor, of which there are duplicates made under the laws of the State and recorded as required by law; for they have made no affidavit here that these commissioners did not comply with the law and record those copies. Now, then, the fraud charged in the bill in regard to the returns in the office of the Governor is a charge that Governor Warmoth desires to exclude votes, and it is based upon the fifty-fourth section of the election law, which is as follows:

* * * * "The Governor shall at such meeting open, in the presence of the said returning officers, the statements of the supervisors of registration, and the said returning officers shall, from said statements, canvass and compile the returns of the election in duplicate. One copy of such returns they shall file in the office of the Secretary of State, and of one copy they shall make public proclamation, by printing in the official journal and such other newspapers as they may deem proper, declaring the names of all persons and offices voted for, the number of votes for each person, and the names of the persons who have been duly and lawfully elected."

They have no right to declare who is duly and lawfully elected as Governor; that power could not be delegated to this board under the constitution. The section goes on to say—

"The returns of the elections thus made and promulgated shall be *prima facie* evidence, in all courts of justice and before all civil officers, until set aside, after a contest according to law, of the right of any person named therein to hold

and exercise the office to which he shall by such return be declared elected. The Governor shall, within thirty days thereafter, issue commissions to all officers thus declared elected who are required by law to be commissioned."

This law says that the Governor shall issue commissions to all such persons thus declared elected, evidently contemplating that this returning board should only declare the election of those officers who are required to be commissioned by the Governor, and all officers of the State are required to be commissioned by the Governor except the Governor himself, who has no commission from any source. This commission is a public declaration of the members of the Legislature in General Assembly convened, announcing the result of the vote. Section 55 reads:

"That in such canvass and compilation the returning officers shall observe the following order: They shall compile, first, the statements from all polls or voting places at which there shall be a fair, free, and peaceable registration and election. Whenever from any poll or voting place there shall he received the statement of any supervisor of registration, assistant supervisor of registration, or commissioner of election, in form as required by section twenty-nine of this act, on affidavit of three or more citizens"—

So your honor will perceive that it is only upon the reception by this board of the report required to be made by a commissioner of election, or a supervisor or assistant supervisor of registration, under section twenty-nine, on the affidavit of three citizens, that this board of returning officers, of which the Governor is the head, is authorized to take any action—

—"of any riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, which prevented, or tended to prevent, a fair, free, and peaceable and full vote of all qualified electors entitled to vote at such poll and voting place, such returning officers shall not canvass, count, or compile the statement of votes from such poll or voting place until the statements from all other polls or voting places shall have been canvassed and compiled. The returning officers shall then proceed to investigate the statements of riot, tumult, acts of violence, intimidation, armed

disturbance, bribery, or corrupt influences, at any such poll or voting place; and if, from the evidence of such statements, they shall be convinced that such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, did not materially interfere with the purity and freedom of the election at such poll or voting place, or did not prevent a sufficient number of qualified voters thereat from registering or voting to materially change the result of the election, then, and not otherwise, said returning officers shall canvass and compile the vote of such poll or voting place with those previously canvassed and compiled; but if said returning officers shall not be fully satisfied thereof, it shall be their duty to examine further testimony in regard thereto, and to this end they shall have power to send for persons and papers. If, after such examination, the said returning officers shall be convinced that said riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, did materially interfere with the purity and freedom of the election at such poll or voting place, or did prevent a sufficient number of the qualified electors thereat from registering and voting to materially change the result of the election, then the said returning officers shall not canvass or compile the statement of the votes of such poll or voting place, but shall exclude it from their returns."

You will therefore perceive that the only power whatsoever given to this returning board, is to go through the simple clerical labor of adding together the returns made by the commissioners of election, duplicates of which are filed with the clerks of the courts throughout the State; and the only other jurisdiction which it has is, that when these statements are made by the supervisors of registration or the commissioners of election in regard to fraud or violence upon the affidavits of three citizens, then I say it is constituted a board to investigate and determine upon that question; and if they come to the conclusion that riot, tumult, or unfair practices prevented a fair vote at any particular poll, they do not reject any particular vote, but their jurisdiction gives them only the right to exclude the poll, and exclude all the votes, black and white. There is no discrimination in regard to color. There is no constitu-

tional right guaranteed by the fifteenth amendment which applies exclusively to the protection of the rights, in regard to voting, of those of a certain race, condition or color, which this board has any control over. They have no jurisdiction on that subject. It is impossible to exercise the jurisdiction conferred in a way to create a case coming under the constitution or under the enactment of Congress. Your honor will remember that this fraud is charged upon him with the view, as Kellogg asserts in his bill, that Governor Warmoth desires to exclude votes, and the implication is of necessity that Governor Warmoth will count, unless your honor interferes to prevent this enormous fraud, all the votes and exclude none of the boxes; for the charge made, though twisted and turned with that verbose phraseology which makes it difficult to extract the essence and the idea of the bill, when analyzed, and when you eviscerate the real charge, is, that all of this manipulation, suppression, and fraud, is simply with the view to exclude votes, or rather to exclude returns; and I call the special and particular attention of your honor to that clause of the bill, to show that I have interpreted it correctly. After describing the conflict between these two boards, the bill goes on to say:

* * * "That your orator believes, and therefore avers the fact to be, that it is the intention and deliberate plan of the said defendants aforesaid, pretending to act as returning board as aforesaid, to make such pretended canvass of votes as shall effect an apparent defeat of your orator, and declare the said McEnery elected as Governor of said State; that to produce said result they will give effect to all such fraudulent certificates and returns as tend to produce such an effect, and tend to exclude from all consideration, count, or canvass all votes of persons of color that have been suppressed or prevented from being cast." * * *

I have read this extract to show that these returns, even if destroyed, by no means affect the votes rejected or the votes suppressed, because, of course, they are not included in the count or in the returns which are on file in the office of the Governor. The bill goes on to say:

"And your orator further shows, that said defendant, H. C. Warmoth, claiming to be in possession of the returns of a large number of the supervisors of registration, refused to open said statements of the supervisors of registration in the presence of said returning officers, being influenced in said refusal, as your orator believes, by the fear that said returning board would make due and proper investigation of the truthfulness of said returns and statements." * * *

Now, the only due and proper investigation of the truthfulness of these statements would be to investigate in regard to fraud and violence in the election, because that is all the jurisdiction this board has, except the physical labor in counting the returns of the commissioners.

"And that said scheme for excluding lawful ballots would be defeated; or that evidence of the frauds that had been committed, and of the fact that a large number of persons had at such election offered to vote, and had been denied the right to vote, contrary to the Constitution and laws of Congress, would be discovered." * * *

Now, the law does not require, in regard to persons who offer to vote, the commissioners of election to take any evidence whatever; nothing of that sort is returned. As I have said, the complainant has possession of that. The frauds in regard to suppressed votes could not appear on the returns; therefore the only fraud which could by any possibility be committed, would be in determining to reject or exclude certain votes or polls on the grounds stated in sections 29 and 54 of the election act of 1870. That is the only possible jurisdiction this board has, and the only possible way by which Kellogg could be at all affected would be by this board, vested with this power to determine these questions, excluding votes not on account of race, color, or previous condition, but on the ground of violence, tumult, and unfair practices. That exclusion, I say, could not affect him, because he brings this suit upon the ground that by the returns, as they stand, he is a defeated candidate, and that he has a right to preserve them. The exclusion of some votes will not make him a worse defeated candidate than he is now. I therefore say, sir, that granting the

constitutionality of the act of Congress of 1870, for the purposes of the argument; granting that we do not appreciate the changes which have taken place by virtue of the adoption of the fourteenth and fifteenth amendments to the Constitution of the United States; granting that the learned counsel who opened the case is the only one in this community who does appreciate these important changes; granting that he has the right to arrogate to himself that sort of self-complacent satisfaction manifested by the insinuation that we are the Bourbons and he the man of progress, so far as the constitutional theory is concerned—so far as the Constitution has been affected by the amendments adopted since the war: yet I can tell him that he forgets that whatever may have been the past, so far as this election is concerned, in respect to the constitutional amendments, both parties stood upon the same platform. Both parties accepted the fourteenth and fifteenth amendments, and declared that they accepted them in good faith and honor. Both parties agreed to stand by them. Both parties, one represented by Mr. Greeley, the great defender of the colored race, and the other by Grant, the representative of the constitutional amendments, agreed upon this question. Therefore it comes with bad grace from the learned counsel to say that any of us who are engaged in the attempt to maintain the purity of the ballot-box, to assert simply our local rights under a legitimate State government, are forgetting our duty to the Constitution, and will attempt to rise before this court and make an argument upon a constitutional theory, which we concede that the war, in part, has destroyed, and to which we submit, and which in other parts has been changed by the constitutional amendments referred to. He must think, indeed, that progress lies upon only one side of this case, and that we, who conceive that we are right, (although I grant him the same privilege,) are blinded by the prejudices of the past, and are not able to see the case as it is presented by the light of the nineteenth century and of the year 1872, instead of 1861.

But still, although I say that we are up to the times and

recognize these constitutional changes, and perceive that there is difficulty in consequence of these changes in drawing the line of demarcation between what has been changed and what has not, because the questions are intricate, we do not concede that the constitutional government created by our ancestors, by which the States are separated from the Federal Government, and charged with the execution of certain local affairs, while the general government is classed with our foreign and general domestic affairs—we do not recognize that all these landmarks have been destroyed and broken down by the constitutional amendments referred to, and that the State to-day, as the counsel sneeringly said, is a municipal government, which it was in the power of Congress to destroy if it pleased; when the very essence of the Government depends now, as it did when it was first formed, upon the constitutional theory that there *are* States, aving separate and independent powers, under a generalh government which under the constitutional amendments has more enlarged powers than it had before. It is true the constitution was changed, but it was only changed to the extent of the powers conferred by that instrument and its amendments, all others being, as they were in the beginning, reserved to the States or the people thereof respectively. What really is the effort here, sir? The insinuation in regard to the constitutional power was thrown out for an object. The effort here is practically to have the United States court interpose, when the act of Congress does not give it the power to do so, and declare who is or who shall be the legal board of returning officers for this State; and the pretext is that we have corrupted all of the officers of election; that the men elected have participated in this corruption; that even a candidate whose reputation up to this time has never been assailed in any court of justice or elsewhere, Governor McEnery, has participated in these frauds, and your honor has actually enjoined him for the time being—unadvised, of course—from acting as Governor of this State. And, sir, when in the face of these alleged frauds we bring in the affidavits of all who are charged with

them, denying them; when there is no evidence whatsoever of such frauds except the allegation made by the complainant in his bill; when we go a step farther and say, "Now you have charged us with fraud, we believe that you desire to get possession of these returns for a fraudulent purpose on your part. You have restrained us from counting these votes in the federal court; we have restrained you from counting the votes in the State court: thus locking up all the administrative powers of the State government, by which alone it is enabled to perpetuate its existence." When the Governor of this State, in that condition of things, signs a bill by which the authority of these two contending boards is repealed, he is charged with what! With a *coup d'etat*, to defeat the operation of your honor's injunction; and the learned counsel has the hardihood to insinuate that the approval of that bill by the Governor, in the exercise of his constitutional functions as the Chief Executive of this State, was a violation of your honor's injunction.

What new theory of *coups d'etat* is this? A *coup d'etat* I understand to be an unconstitutional assumption of authority, by which the established government is overthrown, either in whole or in part; and yet this constitutional lawyer, who is up to the progress of the times, calls a constitutional function, performed by the Chief Executive, over which nobody has any control, a *coup d'etat;* as if the Governor of this State, or of any other State in this Union, could ever be guilty of a *coup d'etat* in the exercise of his constitutional functions. They say that this *coup d'etat* is to be carried out by a fraud. What fraud, sir, can we commit? They say that we desire, through the instrumentality of Hatch, DuPonte, the Governor, and Wharton, to perpetrate these enormous frauds on the State. What do we do? We come in now and lay down our power; we abandon the position where we are enabled to commit this fraud; we surrender the authority to act as returning officers of this board, because the repealing act repeals that authority; and, in order to put our act beyond all question, we convoke the newly-elected Legislature to nominate and appoint

officers, who shall count these returns and give everybody a fair show. Does that show fraud? The man who occupies the vantage ground, the man who is in possession, the man who is enabled by the physical power of the State, as the Executive, to carry out, so far as the State courts are concerned, his objects of fraud, if he desired to do so, that man, when charged with fraud in this court, comes in and says: "To show that these allegations are false, to show that they are perfectly baseless, to show that these men themselves have entered into a scheme to get possession of these votes, in order to defraud the people of this State, I come forward now; I sign this bill; I give up my power; I surrender the means of perpetrating the fraud, as you allege; and call in an umpire, a third party, the legitimate tribunal of the State, to select those into whose hands I will confide these returns, and who, openly and before the public, will engage in their canvass and count these returns."

And this is a *coup d'etat*. Why, sir, there is nothing on earth that Governor Warmoth could do, for the purpose of protecting the purity of the ballot-box and of these returns, which would satisfy these people, except to surrender them into the hands of—whom? Into the hands of a board, depending for its existence upon a removed Secretary of State, or alleged Secretary of State, who is a defaulter; depending for its existence upon a man who, contemplating that his machinations with Lynch would be discovered, apprehended that he would be removed; because on the 8th, a week before he was removed, he goes to Douglass, and employs him to make him a seal of State, to enable him to say that he had the seal of State; imagining that the notion which prevailed in old English times, that the party who had the seal of the State had the office, was still in vogue—he goes, I say, on the 8th, in anticipation of the very fact which occurred, in order to defeat the legitimate action of the Executive in removing him, and prepares this seal, and then, when the question arises, he goes into court, and swears that he has the seal.

We proved that he had it not; and we proved that the only seal was then in the office of the Secretary of State, and his own employee had refused to deliver the one ordered by him, because he considered it criminal to deliver it to a person who did not occupy the position of Secretary of State. Because we will not surrender these returns to the board created by this man, and have them counted by him and another man named Lynch, who swears that at the meeting of the board, when the vote was put in regard to Hatch and DuPoute, the Governor being present, Wharton being present, Herron being present, and Lynch being present, he voted "No;" when all the other witnesses, interested and disinterested, swear that he did no such thing: that the vote was put; that Hatch and DuPoute were declared elected; that they were sworn in; that Lynch voted neither nay nor yea; that he acquiesced in their being sworn in; that he did not say a word until appealed to by Herron to leave, and it was only after repeated importunities on the part of Herron that he snatched up the minutes and left the room. This man, who comes here before this court and goes before the eighth district court and swears that he voted nay, (just about as true as the allegations contained in this most admirable bill,) because the Governor will not surrender the votes of the people of this State to a board created by these two persons who, after all that occurred in the Governor's office, retreated, go before the chief justice and are sworn in, representing themselves as constituting the board; because the Governor will not submit the votes of the people of this State to the scrutiny of such a board, he is charged with fraud, and that, too, by whom? This very Secretary of State himself, who was put into the position he occupied by Governor Warmoth in 1871, on the removal of George E. Bovee, and now, after he holds the office by virtue of this removal, after he has enjoyed it by virtue of this removal, after he has plead in the very suit the record of which has been brought before you the legality of this removal, and claimed the possession of the office by virtue of this removal, he turns round and says, when HE

is removed, that it is a very different thing; that the Governor has no power to remove him, although he had the power to supersede George E. Bovee, who was elected Secretary of State in 1868.

Now, sir, what has the Supreme Court of this State said upon the legal status of Mr. Herron? The record which I referred to before is the one where the lower court adjudicated that the Governor had the right to suspend, and an appeal being taken was dismissed, and the Supreme Court never expressed any opinion upon it; but in the case of Wittgenstein against Fairfax and Herron they did express an opinion. Wittgenstein had been appointed Assistant Secretary of State by Bovee, who had been elected Secretary of State. After the election of Bovee, and Herron taking possession of the office, the latter undertook to appoint an Assistant Secretary of State, an office created by the laws of Louisiana. That Assistant Secretary of State thus appointed was named Fairfax, and he took the place of Wittgenstein, who was then in the office. Thereupon Mr. Wittgenstein sued Mr. Fairfax, claiming to be the legal Assistant Secretary of State. What does the Supreme Court say upon the subject? The case is numbered 3905, and the opinion was delivered by Justice Taliaferro on May 23, 1872:

"The Governor is without power to appoint a Secretary of State, unless a vacancy occur in the office, and then only *ad interim*, as provided by the constitution. Conceding that, in case of the suspension of the Secretary of State from the performance of the duties of the office, the Governor would have, on general principles, the right to appoint a person to discharge the duties of Secretary of State, upon which we express no opinion, the person so appointed would be clothed only with ministerial duties, such as arise in the usual routine of office business. The Secretary of State is vested by law with the power to appoint an Assistant Secretary of State. This is not a mere ministerial duty. The person charged with the performance of the ministerial duties of the Secretary of State, during his suspension from office, is without power to remove from office, and much less without the power to appoint to office, an Assistant Secretary, for the reason that he himself is not Secretary

of State. The appointment of Fairfax to the office of Assistant Secretary of State by Herron is therefore nugatory and without effect. Wittgenstein's right to that office was in no manner impaired by the action taken in the matter by Herron. The suspension of Bovee from office by the Governor did not affect the right of Wittgenstein to discharge the duties of the office of Assistant Secretary of State, and the ejection of the latter from office was without warrant or authority of law. We think the judgment of the court *a quo* erroneous."

Now, sir, in a matter of this sort, it is not necessary for me to cite authorities to show that the courts of the United States will always follow, in regard to the construction of State constitutions and State laws in reference to the offices of the State, the decision of the highest tribunal of the State. Here, then, is a decision of the Supreme Court of the State of Louisiana, to the effect that all that was effected by the Governor was the suspension of Bovee from the discharge of the duties of the office of Secretary of State; that notwithstanding his suspension, he remained and was and is Secretary of State; that the appointment of Assistant Secretary of State belongs to the Secretary of State; that therefore Herron, being appointed by Governor Warmoth during the suspension, was only authorized to discharge the ordinary routine duties of the office. The appointment of the Assistant Secretary not being a mere ministerial duty, and Herron not being Secretary of State, but Bovee, Herron had no right to remove Wittgenstein and appoint Fairfax. There was no vacancy in the office of Secretary of State, Bovee still filling it, notwithstanding he was paralyzed by the suspension by the Governor in executing physically its duties. What is the result? That this man, who claims to be Secretary of State, notwithstanding he got possession by the removal of his predecessor and his own appointment by the Governor, was nothing more nor less—there being no provision of the constitution of the State regulating the power of suspension—than a mere clerk, selected by the Executive, from the necessities of the case, to discharge the routine duties of the office of the Secretary of State, which

never was made vacant by the suspension, and which Bovee filled then and fills now: only his power is paralyzed by the suspension. If this be the proper view taken of this fact, what right has Herron, being a mere clerk, to question the power of his master to discharge him? I repeat the word—*master*. He holds no office; the Secretary of Stateship is an office. Bovee holds it in a constitutional view, but he is not discharging the functions of it. Herron discharged them for a time; he did it as the clerk of the Governor. His master put him there, his master removed him; he holds no office; he has no tenure; it is undefined by law; it has no term; it has no legal existence so far as the statutes of the State are concerned; and therefore it is a temporary employment of a clerk to perform temporary duties. He is in the position of a clerk in a store, whom his employer can at any time discharge: and yet he goes off and has a seal made, as if he was invested by the people of this State or by the laws of this State with the office, which he had a right to hold in spite of the removing power of the Governor. Therefore, away with this man Herron, either as to fact or as to legal power.

But, sir, what are the facts that occurred when this board assembled? They talk about schemes of fraud on our part. What did they do! On the 12th of November they convoked this board, and immediately Mr. Lynch and Mr. Herron, in pursuance of the scheme they had evidently been concocting, (for I speak by the minutes,) moved that the vacancies in the places of Anderson and the Lieutenant Governor, who were incompetent to serve in consequence of being candidates at the election, should be filled. The Governor, taken by surprise, seeing the scheme which these parties had in view, fought for a postponement, and after some debate it was postponed to the thirteenth. The Governor, on the thirteenth, paralyzes this man Herron by removal. They meet at the board; he calls in Jack Wharton, whom he had appointed as Secretary of State, and who shows his commission. Herron, notwithstanding his removal, with the impudence of a man who will engage in

anything for reward, made an effort to put the proposition that Longstreet and Hawkins should be selected. The Governor thereupon stopped him, and said, "You have nothing to do here. I propose Hatch and DuPonte." The vote is taken: Herron voted No, so he says; the Governor voted Yes; Lynch said nothing. Hatch and DuPonte were immediately called in; they were sworn in, Lynch saying nothing, still seated at the table. Herron, seeing they were sworn in and that he no longer could be of any use in carrying out the scheme which they had in view, calls Lynch away, who takes off the minutes with him, thinking that the minutes, like the seal, constituted the board, and proceeded to the office of the chief justice to be sworn in as a board, without having convoked the board, without having asked the Governor to assemble to constitute the board; and they set themselves up as being the legal board. Now, if there is any principle of law that is well settled, it is the principle which governs this point. I am arguing upon the supposition that Mr. Lynch did not vote, but that the Governor did; admitting that Mr. Jack Wharton did not vote, or was not authorized to vote, though he did. The minutes are that Mr. Jack Wharton voted also; but throw Jack Wharton out and throw Herron out, then the only two remaining officers were the Governor and Mr. Lynch, two legally constituted officers. The one puts a vote, and votes for certain individuals: the other sits silent and says nothing. They are sworn in, and he says nothing. I say, sir, that that is an election. In 2 Burrows, page 1018, is laid down the following:

"At this meeting the mayor nominated Mr. Seagrave, which none then opposed; the vote was taken, and nine voted for Mr. Seagrave; after which ten or (as it is said) eleven protested against any election at all at that time. But mere silence is not a negative, either express or implied, and as no other person was proposed, and nine voted for him and none against him, he was well elected."

That was the argument of the counsel.

"Lord Mansfield saw no doubt in this case. Here was an assembly duly summoned, one candidate was named;"—

The only names mentioned in this case were those of Hatch and DuPonte: Governor Warmoth prevented any other from being named:

—"they had no right to stop in the middle of the election. The mayor did not put any question for adjournment, nor was there any. * * *

"Lord Mansfield confirmed his former opinion. He said the protesting electors had no way to stop the election when once entered upon, but by voting for some other person than Seagrave, or at least against him; whereas here they had only protested against any election at that time."

"Mr Justice Wilmot: There was a case of Rex *v.* Withers, (Pasch., 8 G. II, B. R.,) where out of eleven voters five voted and six refused, and the court there held that the six virtually consented."

"In the case of Regina *v.* Boscawen, (P. 13, Anne R. R.,) (*in Truro*,) where ten voted for Roberts and ten for Boscawen, a non-inhabitant; the votes given for the non-inhabitant, where inhabitancy was necessary, were holden to be thrown away. So in the case of Taylor *v.* Mayor of Bath, (Temp. Ld. Ch. J. Lee, B. R.")

"Lord Mansfield: Whenever electors are present and don't vote at all, as they have done here, they virtually acquiesce in the election made by those who do."

That case is again reported more fully in the 1st William Blackstone. Suppose an election should be proclaimed in New Orleans for mayor to-morrow, and we, believing that there is a mayor already elected, or for some other cause do not choose to go to the polls, and it turns out that we are mistaken, and that really an election should have been held to-morrow; and suppose that two men go to the polls and vote for Mr. A. B., and all the balance of the people of the city refuse to go and protest against it, those two votes would elect the mayor, notwithstanding the fact that the balance of us protested against it; for the only mode by which a man can protest against any election is to go to the polls and vote against the candidate presented. There is no such thing as protesting against an election; and the only way in which you can defeat a man is to vote against him, or to put up another candidate for whom you will vote in preference. You cannot say that you will not vote at all,

because those who do vote will decide the question. You cannot file a long protest, because protesting is not the way of defeating the candidate who is nominated: you must vote in the negative. Therefore the principle is, that if all the electors were present in an assembled body, and if only one man votes upon a proposition and the others are silent, the proposition is carried. And mark, sir, that Mr. Lynch sat still and saw these men sworn in by Judge Cooley, who testifies to the fact, without making any protest, or undertaking to make any remark upon the subject, without moving any reconsideration of the vote, which he had a right to do, I presume, under parliamentary rules. He does nothing of this kind, but simply takes possession of the minutes, after repeated importunities upon the part of Herron to leave the room, and abandons the place where he should have remained to discharge his duties there by voting in the negative, moving a reconsideration, or by taking some other step which he might consider necessary to vindicate his rights as a member of that board. He does nothing of that sort, but acquiesces entirely, so far as his conduct is concerned, in what had taken place. Then these people assemble together; they go before the courts, and they swear that they are in the possession of the offices of commissioners of election—swear, sir, to a fact which is legally untrue. I say it is untrue, because they say they are in possession and claim to be what is called the *de facto* board; as if, sir, there could be a *de facto* officer under any government who is not physically in possession of the archives and papers of the office, and who is not physically discharging the duties of the office, and who, in the discharge of those duties, is not recognized by the highest power—that is, the Executive of the State or of the nation, who has the army and navy at his back to enforce the exercise of the duties of that office. The *de facto* officer is the one recognized by the Executive of the State, who enforces that recognition by physical power. That is the *de facto* officer; that is the one who is in possession. In this particular case this argument applies with extreme force, because the very law creating this

board declares that the returns of the election shall be transmitted—to whom? To the board? No. One copy to be sent by a special messenger to the Governor; the other to be transmitted by mail to the Governor. What is the Governor to do? The Governor, then, in possession of these returns by law as the Chief Executive of the State, is called on, and he only, to open those returns in the presence of this board, and submit them to their scrutiny.

The Governor is thus vested with the power of recognition, for the board that he opens the votes before is the board recognized by him. The Governor, then, is not only vested with the power of recognition, but also with the physical power of carrying out his recognition; and if the board recognized by him, if the board having the physical power to carry out its orders and decrees, is not the board *de facto*, I know not, sir, what a *de facto* officer is. Therefore, so far as that question is concerned, I hold that the courts of the United States have no right to decide who is or who is not a State officer, and certainly they have no right to do it in a collateral way. Here, in the course of this investigation, it may become necessary, in another view of the case, to determine which is or which is not the legal board of returning officers. They have no right to have that question determined collaterally, either in the State courts or in the federal courts. The only way in which the right to office can be tried is, by the writ of quo warranto in the federal courts, or by a petition, filed by the Attorney General, in the State courts. All courts are bound to recognize the officer in the actual exercise of his office, and cannot allow the question of who is or who is not the legitimate officer to be discussed or entered into in any suit wherein the question may come collaterally before them. Is it necessary for me to refer to decisions to establish that proposition? Is it not a conceded proposition, that the right to hold office cannot be tried collaterally, but that it must be by a direct action and by writ of quo warranto? I will refer to some authorities: 42 Alabama, 491; 25 Arkansas, 336; and in this State the Supreme Court decided (in 21 Annual, p. 655)

that the right to office can only be contested by a writ or suit brought by the Attorney General; and in Michigan it was held that a writ of mandamus was not a proper proceeding to contest the right to office; and the Supreme Court of the United States (in 3 Wallace, 236) held that the writ of quo warranto could not issue, except in the name of the sovereign. That was a case where the officer of a Territory was supposed to be in office illegitimately, and a suit in the nature of a writ of quo warranto was brought in the name of the Territory. The Supreme Court decided that, the Territory not being a sovereign, the suit should have been brought in the name of the United States, and reversed the judgment which had been granted in the lower court. In order that your honor may see the extent of that decision, I will read a part of it:

"The writ of quo warranto was a common-law writ. In the course of time it was superseded by the speedier remedy of an information in the same nature. It was a writ of right for the king. In the English courts, an information for an offense differs from an indictment chiefly in the fact that it is presented by the law officer of the Crown, without the intervention of a grand jury. Whether filed by the attorney general or master of the Crown office, and whether it relates to public offenses or to the class of public rights specified in the statute of 9 Ann., ch. 20, in relation to which it may be invoked as a remedy, it is brought in the name of the king, and the practice is substantially the same in all cases. Any defect in the structure of the information may be taken advantage of by demurrer. In this country the proceeding is conducted in the name of the State or of the people, according to the local form in indictments, and a departure from this form is a substantial and fatal defect. In Wallace *v.* Anderson, this court said that the writ of quo warranto could not be maintained except at the instance of the Government; and as this writ was issued by a private individual, without the authority of the Government, it could not be sustained, whatever might be the right of the prosecutor or the person claiming to exercise the office in question. In the case of the Miners' Bank *v.* The United States, on the relation of grant, the information was filed in the name of the United States in the district court of Iowa Territory. The sufficiency of the information in this

respect does not appear to have been questioned. A State court cannot issue a writ of mandamus to an officer of the United States. 'His conduct can only be controlled by the power that created him.' The validity of a patent for land issued by the United States 'is a question exclusively between the sovereignty making the grant and grantee.' The judges of the Supreme Court of the Territory of Nebraska are appointed by the President and confirmed by the Senate of the United States. The people of the Territory have no agency in appointing, and no power to remove them. The Territorial Legislature cannot prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and conviction by them would be futile as to removal. The right of the Territory to prosecute such an information as this would carry with it the power of a motion without the consent of the Government from which the appointment was derived."

Therefore, for this court to enter into a discussion as to who is or who is not the legal returning board, and to determine it in this collateral way, is not only violating the general principle of law, that no court can determine the right to office except in a direct action, but is violating the further principle, that no other than the government which created the office and appointed the officer can institute the proceedings, no matter what officer it may be. This has been decided, under the usurpation act, by the Supreme Court of this State, and this is the law everywhere. Indeed, until the usurpation act of 1868 was passed by the Legislature of this State, there was no proceeding known to the laws of Louisiana by which usurpation into a public office could be tried, the code of practice having confined the relief exclusively to officers of corporations. The article of the code of practice expressly defines public offices to be, offices emanating from the Governor, by and with the advice and consent of the Senate, or without it, and says that they would be provided for by special laws; but until the act of 1868 was passed there was no remedy for usurpation of a public office. There was a remedy for a man who claimed to be elected to contest the election in a particular way, and thus claim the office; but there was

no remedy for a man who had been put in possession of the office and was then excluded from it by somebody else, until the usurpation act of 1868 was passed. Therefore, I say, sir, that they are asking you to issue a writ of quo warranto, by an injunction enjoining these State officers from performing these functions imposed upon them by the law; and to issue an injunction based upon the principle that these defendants are not the legitimate board, would be deciding a question over which you have no jurisdiction, and a question where, in the administration of the law, your honor is bound, like the courts of the State, to recognize the *de facto* officer until he is displaced by a legitimate judgment in a legitimate proceeding. This power of contesting an election, may it please your honor, is not a judicial power, except in so far as it may have been by express enactment submitted to the arbitration of the court by the legislative power of the government. That principle, sir, as part of the jurisprudence of Louisiana, has been settled by an adjudication of the Supreme Court of this State.

[The judge here left his seat for a few minutes. After he had resumed his chair, Mr. Semmes continued his argument.]

May it please your honor, I had laid down the proposition that the power of counting votes incidental to contesting an election, and consequently of bringing suits in regard to contested elections, was not in the nature of judicial power, but that by its nature it was administrative, and only became subject to the judicial authority to the extent to which it had been subjected to the scrutiny of the judiciary by a special enactment of the legislative branch of the Government. I take and present this view, for the purpose of making this application: That if the power be of the nature I have described, not in itself judicial, but only made so to the extent to which it has been confided to the judiciary by enactments of the legislative departments of the government, even then it can only be exercised in the manner and in the mode indicated by the legislative department; and

the only mode by which a scrutiny into an election, or by which the results of an election can be inquired into, under this act of Congress, is, in a suit instituted by a *defeated candidate, after the result of the election is declared, to recover possession of an office, upon the ground that he was defeated by the exclusion of votes by reason of race*, color, or previous condition of servitude. And the circuit courts of the United States cannot exercise their power, either by bill in chancery or otherwise, unless the suit be for possession of the office. I hope that I make the proposition understood as clearly as I have it in my own mind. It is, to repeat, that it is not in the scope of judicial power to inquire into an election; that it is in its nature an administrative function; that suits for office, which necessarily involve an investigation into an election, did not exist anterior to laws authorizing the courts to make these investigations, and then only to the extent which the legislative department had seen fit to authorize the judiciary to act, and only in the mode in which it is authorized to make such investigations. I will read from 13th Annual (p. 90) the opinion of Judge Spofford in the case of the State of Louisiana on the relation of O. S. Rousseau, praying for a mandamus against the judge of the second judicial district court. That was a case where, through an omission in our election law, the district courts of the State had been granted no power to entertain controversies looking to the judicial scrutiny of votes for the office of judge of the second judicial district.

Judge Spofford says:

"If the statute under which he attempts to proceed does not embrace his case, he is without a standing in court. The contesting of votes is not a judicial function, only so far as made such by special statutes. Indeed, some may have gone so far as to question whether this is not wholly a matter of administration, which cannot with propriety be referred to the judicial tribunals at all. At any rate, it is clear that such tribunals cannot usurp any greater control over this business than is specially imposed upon them by law. In the absence of a statutory authorization, they are without jurisdiction of the matter, *ratione materiæ*. The

consent of parties cannot give jurisdiction, and all courts before whom such an unauthorized controversy is brought must decline, *ex officio*, to render any order which would recognize a right to sustain the case."

I have referred to this case to show that this is a special jurisdiction, the result of special enactments, and can be exercised in no mode except the mode designated in the statute, and to no extent beyond the limits therein described. To enforce that provision there is a principle of law which declares that neither the courts of the United States nor of the State will interfere to control the action of officers charged with the exercise of those public duties which are discretionary in their character. Now, this returning board, as a board, is a court. The case upon which the court is authorized to decide is made up upon affidavits, sworn to by three citizens, accompanied by the statement of the supervisor of registration; the case is submitted to the board; they then examine it, and if they think that there has been such interference with the elective franchise as to require that the matter should be really and seriously considered, they form themselves into a court; they are authorized to send for persons and papers; they make an investigation, and upon the result of that investigation they announce a judgment, and that judgment is executed by either rejecting or retaining the poll which has been questioned.

Here, then, is a case of the exercise of an important public function, an administrative function by administrative officers, in which the duties are not simply ministerial, for the board is invested with a large and most extraordinary discretion. You are not only asked to enjoin us as the legitimate board from acting at all, but you are invoked through the instrumentality of an injunction—an injunction made a part and parcel of a bill for the perpetuation of testimony, a matter unheard-of in a court of chancery—to stop entirely the wheels of the State government. I say, without the fear of contradiction, that there was never before a bill to perpetuate testimony accompanied by an in-

junction. You are asked, sir, to prohibit us from going on and performing these great administrative public functions; and we contest your right to do so, first, upon the specific ground that you cannot investigate the right to office in this way, and then upon the general ground that a court of chancery ought not to interfere with the administrative duties of public officers in regard to elections. In 48th Illinois, page 489, this question came up. There they wanted to stop the election altogether. And what are you doing here? This restraining order is stopping the machinery of this State; this restraining order is practically arresting the State government. If the theory for which the learned counsel on the opposite side contend be sustained, that you have this power to interfere, then there can be a declaration of the election made by nobody. One side being prohibited by the State court and the other side prohibited by the Federal court; and there is no legislative department of the government in existence to-day. The terms of the members of the Legislature expired on the 4th of November, 1872, and no declaration in the mode pointed out by law, as contended for by the counsel on the other side, can be made. I allude to this, may it please your honor, for the purpose of showing you that, if this power of injunction is to be exercised, it will paralyze the State government, which was not contemplated by the act of Congress. The act of Congress contemplated that the election should be declared; that the officers should take possession; and that if a party was defeated in consequence of the exclusion of votes on account of race, color, or previous condition of servitude, he would have the right in the Federal court to contest. That does not paralyze the State machinery; that does not raze the very foundation of the Federal Government, the existence of States; that does not render the State, so far as all its organs are concerned, a perfect hermaphrodite, without a legislative department. No result of this sort would come from a proper mode of exercising jurisdiction under the constitutional amendments; but this mode proposed here seizes upon the power to determine who are

the legitimate State officers; seizes upon the power to arrest all the machinery of the State government; and seizes upon the power, not necessary to the proper interpretation of the constitutional amendments and not granted by Congress, to control the officers of the State Government in the discharge of their public duties. A court of chancery will not do it. I read from 48 Illinois, page 489:

"If it be meant that a court of equity can grant a temporary injunction to stay the election or prevent the officers elected from acting,"—

As your honor has done by your restraining order in this case in regard to McEnery,

—"until a final hearing, the grounds are not well taken. A temporary injunction is but a matter of discretion, and a court would hesitate long before granting an injunction to stop the holding an election, or to prevent an officer from entering upon the discharge of official duties, even if equity had jurisdiction, at least until after the final hearing of the case. We are aware of no well-considered case which has enjoined the holding of an election, or prevented an officer of the law from giving the required notices for or the certificate of election. To sanction the practice of granting temporary injunctions in such cases would be highly calculated to obstruct the various branches of government in the administration of public affairs. Courts of equity can have no such power, otherwise any and all elections might be prevented, and government greatly embarrassed."

This is not only good law, but good common sense. Congress gave no power to grant mandamuses or injunctions to interfere with State officers in counting the votes or giving certificates of election. Congress, sir, recognized the principle, that there should be no such interference; that it was better to let the fraudulent result be announced, and let the officer go into office and discharge its duties, than to arrest the entire action of a State government, allowing the party of course his remedy, either in an action for damages by bringing a suit to recover the possession of the office and vindicate his rights, or by indicting the party for a criminal act, which could have been done. This principle, sir, is

enforced by the courts of the United States—by the courts everywhere.

In Abbott's N. Y. Reports, 2d volume, New Series, page 290, the court says that even in suits between parties contesting for the right to an office it will not grant an injunction to stop an officer *de facto* from performing his functions. I will read the decision referred to:

"I think there can be no doubt that in actions to oust persons exercising the duties of public offices under a claim of right, a temporary injunction restraining them from exercising the duties of the office pending the litigation will not be granted. I have looked in vain for a single case recognizing such a right. The reasons for refusing an injunction, in such cases, are clear and powerful. The exercise of the duties of offices are necessities to the public welfare. Unless the officer *de facto* is permitted to discharge the duties, they cannot be discharged until the end of the litigation and the legal title is determined."

If you have the right to grant this injunction, and the State court has the right to grant the other injunction, what is the result? That things remain in *statu quo* until the ultimate decision of this case, which may be some three years after it has reached the Supreme Court of the United States. It will be decided, perhaps, after Mr. McEnery, the legitimate claimant of the office, may be in his grave or three-fourths of his term expired. The result will be that state of things which these men proclaim would be the greatest evil that the world ever saw. The result would be that which the learned counsel says has produced a condition of things in this State which is perfectly intolerable. The result would be that which he says all good men abhor. The result would be that this "fraudulent Executive," with his *coups d'etat*, would remain in possession of the Governor's office pending this long litigation.

I will read further from the authority I have just quoted:

"Unless the officer *de facto* is permitted to discharge the duties, they cannot be discharged until the end of the litigation and the legal title is determined. This, in many

instances, might involve a long time, and the public might suffer serious injury, loss, and inconvenience."—

As they undoubtedly would in this case, in the estimation of the learned counsel on the other side.

—"In frequent cases it might block the wheels of State, while the petty inquiry was being investigated whether one or the other of two persons was the legal incumbent, entitled to exercise the duties of the office and receive the pay therefor."

Well might the court say the petty inquiry. It is so petty that, in my humble judgment, no court in this land has jurisdiction to consider the question who is or who is not the legal board of returning officers for the State of Louisiana, and that the Legislature has not vested the power in any one. Why? Because they are but special commissioners, appointed at different periods to discharge a special duty, and become *functi officii* as soon as the duty is discharged, without emolument. No amount is involved in the right to this office, if it be an office, because there is no emolument; and the jurisdiction of the district courts of this State is confined to matters where the sum of over one hundred dollars is involved. It is no office; because the Supreme Court of the United has defined an office to be a parmanent discharge of public duties by a person who is an officer of the Government; and here is no permanent discharge of public duties. Every time that an election takes place under this election law, these men have to appear and take a new oath, and discharge the duties of returning officers as to each election. If it be an office, then neither Herron, nor the Governor, nor the Lieutenant Governor, could hold it; because article 117 of the constitution declares that "no person shall hold or exercise at the same time more than one office of trust or profit, except that of justice of the peace or notary public." These officers are special commissioners, appointed at intervals, for a special purpose, and at special times. The law creates a special and peculiar court, from which there is no appeal. Therefore the subject-matter is not within the jurisdiction of any court,

because the intrusion act is confined to officers; and it is not an office, for the reason that I have stated, nor is it the exercise of a franchise. Although the judge of the eighth district court did, in his opinion in regard to this subject-matter, intimate that a court might entertain jurisdiction over this question, because these men were exercising a franchise, he totally misapprehended the character of a franchise. A franchise is in the nature of a grant made by the government to a citizen, giving him peculiar privileges; it is in the nature of a privilege; it is a contract between the citizen and the government, which in the celebrated case of the Darmouth College was held to be a contract which could not be violated by the State. Offices, under the political theory of this country, are not hereditaments, as they are styled in the English law-books under the English system; but they are considered as mere powers, to be exercised for the benefit of the public.

Therefore this office is not a franchise in the sense in which that term is used in the law of 1868, in regard to the unlawful exercise of offices or franchises. Therefore, sir, I say that there is no court that can take jurisdiction over the subject to determine who is the legal board; that a member of it is not an officer; that he is a mere commissioner, such as the Supreme Court of the State of Louisiana held him to be when, in the olden times, in an effort on the part of a Democratic Legislature to repress the violences incidental to a party, at that time termed the "Know-nothing party," they created a central board of election in this State, and Mr. Moise, then Attorney General here, having been, by the enactment, made one of the commissioners, the question came up before the Supreme Court of the State whether or not he could exercise the duties of commissioner, the objection being that it was an office, and that it was incompatible with his position as Attorney General. The Supreme Court of the State held that it was not an office; that he was performing duties simply as a special commissioner, and that therefore it was not incompatible with the position which he held as

Attorney General of the State. I allude to this for the purpose of showing that these commissioners of election, appointed only at a time when an election is held, are not officers in the sense contemplated by the law which authorizes suits to be instituted for ejectment from office. It is important that courts should not have jurisdiction over such matters, because it is manifest that a corrupt judge could easily put in whom he pleased and put out whom he pleased, without any appeal to the highest tribunal of the State, because the amount involved in the contest for the position would not reach five hundred dollars, there being no emolument attached thereto. It was never intended to place any such power in the hands of any inferior tribunal. Therefore, sir, I say this question is entirely beyond your jurisdiction; you have not the right to make any inquiry into it at all. All you are authorized to do is to recognize Governor Warmoth as vested with control over this matter of determining what board is the legitimate board. Notwithstanding that efforts have been made, as I have been told, to produce the opposite result, in the interest of those engaged in the conflict in regard to this election, still Governor Warmoth is recognized by the Chief Executive of the nation as the legitimate Governor of this State, and as such in the discharge of his duties; and you are bound to recognize him, and to recognize those persons as officers whom he recognizes as officers *de facto*, particularly when the law, under which in this case he recognizes DuPonte and Hatch as the legitimate officers, gives him the right, the political right, without control over him by any court, (because no court has jurisdiction, as I have shown,) to determine the question as to which is and which is not the legitimate board of returning officers. He alone is authorized to declare before whom he will open the returns; he is the one to whom the returns are transmitted, and who acts as their custodian, and it is through him that they are submitted to the board for examination. What that board shall be, and of whom it shall be composed, is fixed by law; and no matter what

person the Governor determines shall occupy *de facto* the office of commissioner, there is no tribunal in this land that can revise his judgment.

It is unnecessary for me, may it please your honor, to read authorities to show that there is no presumption of jurisdiction. The Supreme Court of the United States has held that there is no such presumption, and that it must be established affirmatively. (4 Dallas, 8; 5 Cranch, 153, &c.) Nor is it necessary for me to read authorities to show that the jurisdiction of the circuit courts is special. They have no probate jurisdiction, and cannot determine any matters in regard to divorce. (18 Howard, 350; 21 Howard, 352.) These authorities are mentioned to meet the proposition of the counsel on the other side, that this was a general equity jurisdiction that this court was called on to exercise under these constitutional amendments.

A court of chancery will not enjoin an officer in the performance of the duties of a public office not merely ministerial. (1 Cranch, 166; 12 Peters, 524; 14 Peters, 497; 6 Howard, 100.) It is unnecessary for me to read the authorities on this point; the law is too plain.

The most recent case on that point is 7 Wallace, 487, where an effort was made to enjoin the Secretary of War, and the court said there was no authority for it to control him in his action. A court will not enjoin the performance of public duties by any public officer.

I also refer your honor to 6 Wallace, 407, and the case of the State of Mississippi against President Johnson, in 4 Wallace. There an effort was made, upon the ground that the reconstruction acts of 1867 were not constitutional, on the part of the State of Mississippi, to enjoin President Johnson from the execution of those laws. The Supreme Court of the United States said it would not entertain jurisdiction over the case, for the reason, among others, that a court of chancery never does interfere to arrest a public officer in the performance of his public duties.

Now, sir, the argument which I have addressed to your honors presupposes that this board which your honor has

enjoined, and which the State court has enjoined, is in existence. I deny the proposition; and if I succeed in maintaining that the law creating this board is repealed and the board annihilated, I presume that, whatever may be the views of your honor on every other subject connected with this case, you must refuse to grant this injunction, for the reason that the only board against which the injunction is asked, the only board which it is charged is going to commit these enormous frauds, is the board composed of Hatch, DuPonte, Wharton, and the Governor, which has been dissolved. Now, if the Governor has voluntarily cut off his own head and the heads of his colleagues, so as to do away entirely with the pretense of fraud charged in the bill, why of course that is an end to the case. I presume that is a manifest proposition; so manifest, that you honor seized upon it in advance, and was perfectly amazed, no doubt, at the learned counsel who opened the case touching so lightly upon it, because it saves all of this lenghthy investigation. I have been compelled to argue the case as I have done, because the leaned gentlemen on the other side have already thrown out an intimation that this *coup d'etat*, as they call it—this exercise of a constitutional function, as I call it; this act for which Governor Warmoth should be imprisoned, as they say; this act of the Executive of the State, which he could not have performed in the exercise of his discretion, as I say;—was not intended in earnest. As if the Governor of this State had merely for a little side-play signed a bill, and that the parties were playing with one another a mere game, without reference to practical results. That was the intimation that was thrown out.

I say, sir, that that law was signed with no other object in the world than to throw the question of who is or who is not elected into the hands of the men charged on neither side with fraud. That law was approved by my advice, and for that purpose; and if I fail to accomplish the object contemplated, the reason will be two-fold: First, my want of knowledge of the profession, as to what the effect of it would

be; second, my want of judgment in regard to what I supposed would be the result, which was, that both the contesting boards would come in and say, "Now, let this new board be elected by the Senate, and let us settle this unseemly controversy and cease this bickering, and put an end to these charges of fraud and criminations and recriminations." But, sir, the peace offering which has been made is rejected with taunts and with scorn; it is rejected by the insinuation that it is a mere *coup d'etat*, made with the object to gain some mere political advantage over a political opponent. Having been met in that spirit, the only thing left here for us to do is to assert our legal rights before this court, and to present them in the manner in which they have been presented to the minds of counsel engaged in advising the Governor as to the effect of that law, and let your honor determine who is right and who is wrong. Remember that this olive branch was held out under these circumstances: that the new law expressly provides, that this board to be created shall be selected by the Senate from men composed of both political parties—of *all* political parties. In this case there would be, I suppose, a straight-out Democrat; there would be a Liberal Republican; there would be a Radical Republican; and then there would be some sort of a fusion man, as they call it; then—I forget what other names they have—but all the varieties of political parties would be represented. This is the proposition we now offer; this is what we are now seeking to accomplish by asking your honor to stay your hand. All that we ask is for the United States Government to stay its hands: let this new and impartial board thus selected under the new law go into operation, examine the returns, and proclaim the result. They refuse the proposition: we ask your honor to enforce it.

In the first place, I have authorities to the effect that a law of the State of Louisiana may take effect from and after its passage without promulgation. I produce these authorities, as I do not know what questions might hereafter be raised. I refer to 2d Annual, p. 86; 8th, New Series, p. 843; 13th Annual, p. 502; 14th Annual, p. 486.

In the second place, that the Governor of this State is authorized to sign a bill during vacation. (Belden *v.* Hagan, [The Slaughter-house case,] 22d Annual, p. 548.) There the Supreme Court settled that proposition. The next question is, what is the effect of this new law upon this board, or upon the law creating this board? The act is act No. 98, and is entitled—(I read from the New Orleans Republican)—

"An act to regulate the conduct and to maintain the freedom and purity of elections; to prescribe the mode of making returns thereof; to provide for the election of returning officers, and defining their powers and duties; to prescribe the mode of entering on the rolls of the Senate and House of Representatives; and to enforce article 103 of the constitution."

Now, the repealing clause is as follows:

"*Be it further enacted, etc.*, That this act shall take effect from and after its passage, and that all others on the subject of election laws be and the same are hereby repealed."

There is no question, therefore, that the Legislature intended that this law should repeal all other acts of a similar character. There is nothing said about laws in conflict with this, nothing about revision, nothing about amendments. They embraced in one comprehensive system, under this act 98, all the law regulating the subject of elections in this State, and repealed all other laws on that subject. This, then, is the law of the land. The second section provides as follows:

"That five persons, to be elected by the Senate from all political parties, shall be the returning officers for all elections in the State, a majority of whom shall constitute a quorum, and have power to make the returns of all elections."

So that it creates a board in an entirely different mode from that adopted in the preceding law. That act recognized as members of that board certain parties by name, to wit: T. C. Anderson, John Lynch, and the Governor, the Lieutenant Governor, and the Secretary of State, *virtute officii*. The Legislature itself, I say, selected by name two of the

members of this returning board, and designated certain officers as constituting the other three. This last act throws the duty upon the Senate of selecting this board from time to time, and declares that it shall be selected from all political parties. There is no term to the office or to the performance of its duties. The election must be held by the Senate every time a State election takes place; whereas under the old law Anderson and Lynch were permanent members, and the other three were members as long as they remained in their places as Governor, Lieutenant Governor, and Secretary of State. These are the differences in the constituent elements of the two boards. Your honor will perceive that this law contemplates at every election a fair return, through the instrumentality of persons selected, for the time being, by each successive Senate. Now, why is it that this law, which is explicit, does not repeal all preceding acts? The gentleman referred me to a case in the Supreme Court of the United States, reported in 2 Wallace, which has nothing whatsoever to do with the principle involved in this case. What is that case? A pilot, who exercised a certain authority under an act of 1861, in California, had performed certain duties, for which he was entitled to so much compensation. A subsequent act repealed that law, and instituted a new mode of piloting. He, having performed the services while the previous act was in existence, claimed his compensation. The Supreme Court very correctly decided that the repeal of the law, by which the mode of pilotage was changed, in no manner affected his right to his compensation, which had accrued under the act which was in force at the time that he rendered the services. I would not contend for the opposite proposition. In the course of its decision the court says:

"And it is clear that the Legislature did not intend, by the repealing clause in the act of 1864, to impair the right to fees which had arisen under the original act of 1861. The new act re-enacts substantially all the provisions of the original act relating to pilots and pilot regulations for

the harbor of San Francisco. It subjects the pilots to similar examinations; it requires like qualifications; it prescribes nearly the same fees for similar services; and it allows half pilotage fees under the same circumstances as provided in the original act. It appears to have been passed for the purpose of embracing within its provisions the ports of Mare Island and Benicia, as well as the port of San Francisco; of creating a board of pilot examiners for the three ports, in place of the board of pilot commissioners for the port of San Francisco alone, and of prohibiting the issue of licenses to any persons who were disloyal to the Government of the United States. The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them."

Therefore this is an authority for saying that if this old act is continued in force at all, in consequence of some of the provisions being the same in the new act, it is only considered in force with the modifications made by the new act; and the most important modification is that the board is not designated by the Legislature as being composed of the Governor, the Secretary of State, and Lieutenant Governor, but is to be selected by the Senate. If your honor will read the act through, you will find that it was contemplated that it should be put in operation so as to govern the election of 1872.

But, sir, it is said that this election is a unit; that the law which was in existence at the time the ballots were cast the Legislature has no power to change, so far as the counting of the votes is concerned. In other words, it is contended that the Legislature had created a board with power to investigate into the results of this election, which board has been arrested in its action; and that the Legislature, if it were to assemble now, could not put an end to this litigation, by an express enactment that these returns shall be submitted to somebody else. Is not that the proposition? Is not that the ultimate result of the principle advanced? For if the election is such a unit that it is

indivisible—that it is, like an immaterial substance, not capable of parts, and that therefore it is utterly impossible to divide it—then the Legislature cannot assemble to-morrow, (although there is no question about the legality or constitutionality of its assembling,) and pass an act which will, in express terms, take this disagreeable controversy out of the hands of the judiciary. Certainly no such construction as that will prevail. What, then, is the character of this board? Is it not, as the counsel himself admitted in the opening argument, a tribunal or court of a special character, constituted for a special purpose, to investigate into and determine these questions in regard to the returns of the election? The reading of the act will satisfy any inquiring mind that that is the nature of this board; that it is a court of special jurisdiction, created for special purposes, and exercising discretionary power in particular cases. The Supreme Court of this State has recognized as a court a similar tribunal, which is charged with the duty of registration of voters.

Now, may it please your honor, was it ever heard of in a court of justice, that when a court which is trying a case is deprived of jurisdiction over that case, it nevertheless could proceed to adjudicate it? Why, sir, one of the most remarkable cases that ever occurred in the history of this country shows how fallacious the argument is. Do you remember that under the construction of the Constitution of the United States, anterior to the adoption of the eleventh amendment, States might be sued by citizens? After that amendment was adopted, the question came up in the Supreme Court of the United States as to the effect of the adoption of that amendment upon the suits then pending in the courts. If you examine the language of the eleventh amendment to the Constitution, you will find that it declares that the article shall not be so construed as to apply to any suit of a citizen against a State. There is no prohibition, there is no repeal: it is simply an amendment, that it shall not be so construed. In 3d Dallas, p. 378, the Supreme Court of the United States held that the eleventh amendment applied to suits at the time

the amendment was adopted as well as to suits brought after it; and therefore that, in the case then pending, the Supreme Court of the United States was deprived of jurisdiction. Again, the Supreme Court of the United States has held that where an appeal is taken from a judgment, which judgment was correct at the time it was rendered, because of the law then in force, and pending the appeal the law was repealed, the appellate court is bound to reverse the judgment, because it must be a correct judgment at the time that the final adjudication takes place. That, sir, was decided in the case of Peggy, 1st Cranch, p. 180. Justice Martin, in 17 Louisiana, decided that an action begun under a law and not perfected under it becomes void. Therefore, any proceeding begun by these commissioners under this law and not perfected under it is entirely void. That this board is a court, or in the nature of a court, was decided in a case reported in 12th Annual, p. 140, in terms which seem to cover this point entirely. In order not to detain your honor much longer on this subject, I will refer you to a synopsis of all the law pertaining to the effect of repealing statutes, contained in Smith on Statutory and Constitutional Construction, section 765 and 766:

"It has been held that the repeal of a statute conferring jurisdiction took away all right of proceeding under the repealed statute, even in regard to suits pending at the time of the repeal. (Butler *v.* Palmer, 1 Hill R., 324.) This rule has been applied in regard to penal statutes, as I shall have occasion hereafter to show, and the same rule has been held as to the consequences of the repeal against a civil right, so long as it remains inchoate. Such was the case in the case of Miller (1 Blackstone R., 451.) In that case the repeal was held to work the same consequences against a civil right. Miller, an imprisoned insolvent, had been compelled to assign his property, and was entitled to be discharged by an order of the court of quarter sessions as early as the twenty-sixth of September, 1761. But the 2 Geo. III, ch. 2, had already passed, repealing the compulsory clause—such repeal to take place from and after the nineteenth of November of that year. The insolvent urged his discharge, but the sessions adjourned from time to time till after the

nineteenth, then refused to grant it, on the ground that the repealing act had taken place. On motion for a mandamus, Lord Mansfield, chief justice, delivered the opinion of the court, and held that no jurisdiction now remained in the sessions. He cited the repealing clause, which, to be sure, was very strong, that from and after, &c., the same is hereby repealed, *to all intents and purposes whatsoever*. But this, according to what was held in Surties *v.* Ellison, and other cases on the repealing clause, in 6 Geo. IV, ch. 16, was no more than a simple repeal. The first section of the 6 Geo. IV simply repealed all the previous statutes of bankruptcy; but by the last section the section was not to take effect till the first of September, 1825. And there being no saving clause as to acts of bankruptcy committed, or any inchoate proceedings under the former acts, it was held that the court had no power to imply a saving clause, although it was plain that by a mere inadvertence in legislation the kingdom was left for a time entirely destitute of its bankrupt law. The court was pressed for a construction which might avert so great a general evil. But Lord Tenterdon said, 'We are not at liberty to break in upon the general rule;' though he admitted that it was very unfortunate that an act of so much importance should have been framed with so little care. In a previous case Best, C. J., said, that on the first of September all former acts were entirely got rid of. (Meiggs *v.* Hunt, 12 Moore, 357, 359; S. C., 4 Bing., 213.) In a subsequent case a struggle was made to save a deposition as evidence which had been taken to support a commission of bankruptcy under the former statute, (5 Geo. II, ch. 30, sec. 14,) but which deposition did not happen to have been enrolled as that section required, in order to make it admissible."

A stronger case could not be put.

"It was in all other respects completely under the former statute; but the party inadvertently omitted the act of enrollment till after the repealing clause took effect. And the court held that no right remained even to enroll, although the repealing act provided the like power of enrollment in proceeding under itself. In short, after much consideration, the court declared that the clause operated as a simple repeal; and Lord Ch. J. Tindall laid down the rule applicable to such a case. He said, 'I take the effect of a repealing statute to be to obliterate it (the statute repealed) as completely from the records of the Parliament

as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and *concluded* while it was an existing law.'"

"Section 766. It will be perceived that the rule laid down in this and several other cases has no respect whatever to the circumstance that the repealed statute was either of a criminal or jurisdictional character. Nor is it perceived why in cases of civil rights an exception is not just as practicable in favor of a jurisdiction given to enforce the right as to the right itself. On authority then, at least, no rights arising under the repealed statute can be saved except by express reservation in the repealing statute, or where those rights have been perfected by taking every step which depended for its force on the former act."

There is a full discussion of the subject, but I extract only the cream, in order not to detain your honor or fatigue myself by reading three or four pages of similar law. Your honor need not look beyond this book for all the authorities on the subject, unless there are some which have arisen since the publication of this work. If, sir, I am right in this proposition, there is an end to this litigation, because there is nobody to enjoin. The plaintiff and the defendant are dead. The plaintiff board and the defendant board are "gone where the woodbine twineth;" and your honor therefore is relieved from the necessity of investigating this question of fraud.

But suppose I am mistaken as to that, who brings this suit? William Pitt Kellogg, a Senator of the United States at the time of his nomination, a Senator of the United States at the time of his alleged election, a Senator of the United States at the time this board was proceeding to canvass these returns, a Senator of the United States at the time of the institution of this suit, a Senator of the United States at the time of the argument of this cause. Is he in a position to question this election? Is he, under the constitution of Louisiana, entitled to this office if elected? If not, there is no use in making any investigation as to whether he was or was not elected; for, if he was ineligible at the time the

election took place; if ineligible at the time that this suit was instituted; if ineligible now, he has no interest in raising these issues, he has no interest in coming forward and making these charges. Your honor will remark that he files his bill upon the ground that he will at some future day institute a suit to claim the office of Governor. It is a promise upon his part which he is not bound to fulfill; and if he did violate his promise, I don't believe that many tears would be shed in the State of Louisiana in consequence of it. The question presented here is not only one of eligibility under the constitution, so as to render the election as to him void, but it is also a question whether or not his eligibility depends upon his own volition, taking the other view of the case. The question is, whether this court can be called upon to make an idle investigation into a complicated case, which investigation may turn out to be utterly worthless and useless, or its utility would depend entirely upon the whim or caprice of Mr. Kellogg in the future. Your honor will perceive that I draw a distinction between the two propositions. One applies to absolute ineligibility, so as to defeat him at all times for the office; the other is a question of *standi in curia*. Does he come into this court clothed in those garments which would entitle him to be considered in the investigation of this case? Is he now indued with the garment of eligibility, if I may so term it? He was at the time of his alleged election, at the time of the institution of this suit, and is now, so far as our constitution is concerned, excluded from the church. He is an unbaptized infidel, to use ecclesiastical language to express the idea. Can he come into this Christain court until he has the sign of the cross upon him, to show that he is entitled to recognition as within the fold—as being eligible to that station to which he aspires. Now, sir, what does the constitution of the State say upon this subject? Article 52 says:

"No member of Congress or any person holding office under the United States Government shall be eligible to the office the Governor or Lieutenant Governor."

Mark you, this article does not use the language used in the Constitution of the United States, which says that no person shall be a Senator or Representative unless he possesses such and such qualifications; that is, that he cannot *act* as Senator or *act* as Representative if he is not so and so. This article of the State constitution does not say that no person shall be Governor or Lieutenant Governor who holds an office under the United States Government; for then, clearly, if he did not hold such an office at the time that he qualified there would be no prohibition. The language used is, that he shall not be *eligible* to the office of Governor or Lieutenant Governor. There was another article of the constitution which declared that the Governor should be ineligible to the governorship for the succeeding four years after the expiration of the term for which he shall have been elected. That article has been stricken out, but I refer to it as being in the constitution at the time that article 52 was adopted, to show what was in the mind of the framer of the article at the time it was conceived. Another article says, that "No person shall be *eligible* to the office of Governor or Lieutenant Governor who is not a citizen of the United States and a resident of this State two years next preceding his election." So that whenever the word "eligible" is used it refers to the time of election. "He shall not be *eligible* to the office of Governor," etc.; "the Governor shall be *ineligible* for the next succeeding four years;" "no member of Congress," etc., "shall be *eligible* to take the office of Governor or Lieutenant Governor." Does that term "eligible" apply to the time that the election is held, or does it apply to the time that the party may select, at his own volition, to qualify, in order to exercise the functions of the office to which he has been elected? What need, sir, was there to place in the constitution a prohibition that no member of Congress or person holding office under the Government of the United States should exercise the office of Governor or Lieutenant Governor? Because it is a physical impossibility that they should exercise both functions at the same time. He could not be in his seat in the Senate, he

could not be a member of the Cabinet, and at the same time be the Governor. That, clearly, was not within the contemplation of the framer of the constitutional article.

If I were permitted to roam into the field of imagination, I think I could well picture the views that operated upon the mind of the person who first conceived that article; for it is but a copy from other constitutions, and preceding constitutions of this State. I can imagine that he might have seen, in the dim vista of the future, a custom-house surrounded with Gatlin guns, and United States officials in charge of a Republican convention; he might have imagined a convention assembled in some country parish of this State, presided over by the United States surveyor of this port, controlled and manipulated by the United States marshal, supported by United States employees, from whose salaries five per cent. would be exacted in order to be successful in securing the nomination of some chief officer of the United States Government. He might have imagined a convention controlled by deputy marshals, who would allow nobody to enter unless pledged to the support of a particular candidate, who would be an officer of the United States Government. I could draw a picture of influence and power which the framer of this article must have foreseen, and which he desired to prohibit or prevent, and could only do so by declaring that the person in a position to exercise such enormous power in regard to the election of proper officers of the State should not be allowed to do so in his own interest. And, sir, if I am accused of having overdrawn the picture, I think I could with safety appeal to one of the learned counsel on the opposite side to defend me from the accusation. He will testify that the picture is not merely one of imagination, or, if it be imaginary, is not overdrawn, but true to nature. I say, sir, that this article of the constitution was inserted for the express purpose of preventing the exercise of this overwhelming influence, which might be brought into play by any person high in the confidence of the United States Government, by controlling all of its

officials within the boundaries of the State, in order to secure the nomination and election of some favorite of that Government. That should be the construction placed upon the article in order to arrest this evil; and it *is* the construction which has been placed upon a similar constitutional article by the Supreme Court of California, where the question has been discussed and decided.

I read from 15th California, 118:

"Under the 21st section of article 4 of the constitution of this State, a person holding the federal office described in that section is incapable of being elected to a State office; he cannot receive votes cast so as to give him a right to take the State office upon or after resigning the federal office. The word 'eligible' in this section means capable of being chosen—the subject of selection or choice."

That is the head-note. The article of the constitution referred to is as follows:

"No person holding any lucrative office under the United States or any other Power shall be eligible to any civil office of profit under this State; provided, that offices in the militia, to which there is attached no annual salary, or local officers and postmasters, whose compensation does not exceed five hundred dollars per annum, shall not be deemed lucrative."

The court goes on to say:

"The counsel for the appellant contends that the true meaning of the constitution is, that the person holding the federal office described in the 21st section is forbidden to take a civil State office while so holding the other; but that he is capable of receiving votes cast for him, so as to give him a right to take the State office upon or after resigning the federal office. But we think the plain meaning of the words quoted is the opposite of this construction. The language is not that a federal officer shall not *hold* a State office while he is such federal officer, but that he shall not while in such federal office be *eligible* to the State office. We understand the word 'eligible' to mean capable of being chosen—the subject of selection or choice. The people in this case were clothed with this power of choice; their selection of the candidate gave him all the claim to the office which he has; his title to the office comes from *their* desig-

nation of him as sheriff. But they could not designate or choose a man not eligible, *i. e.*, not capable of being selected. They might select any man they chose, subject only to this exception, that the man they selected was capable of taking what they had the power to give. We do not see how the fact that he became capable of taking the office after they had exhausted their power can avail the appellant. If he was not eligible at the time the votes were cast for him, the election failed. We do not see how it can be argued, that by the act of the candidate the votes, which when cast were ineffectual, because not given for a qualified candidate, became effectual to elect him to office. Can it be contended, that if Grow had not been a citizen of the county or of the State at the time of the election, or had been an alien at that time, that the bare fact that he did so become a citizen at the time he qualified would entitle him to the office? Or suppose a man, when elected, under sentence and conviction for crime—if such a case can be supposed—would a pardon before qualification give him a right to hold the office? When the words of the constitution are plain, we cannot go into curious speculation of the policy they meant to declare. It may, however, have been a part of the policy of the provision quoted to prevent the employment of federal patronage in a State election."

Therefore, sir, I say that he has no right to this office, if elected; he has no right to say to the people of this State, "Vote for me at your election, and then, if I choose to take the office I will take it; if I choose to put myself in a position to qualify I will do so." It would then be a matter depending entirely upon his own volition. Why, sir, to such an extent is the doctrine carried, that a party must be eligible at the time of the election; that there are decisions of the high courts in England to the effect, that votes given for an unqualified or ineligible candidate, at the time of the election, are votes thrown away, and cannot be counted. In the celebrated case of Gosling *v.* Veley *et al.*, reported in 7 Adolphus & Ellis, N. S., the Court of King's Bench, Lord Denman, decided that votes given for a person who is notoriously unqualified are votes thrown away, and that the party qualified receiving the next highest number is elected. The same doctrine has been pronounced in the case of The

People *v.* Clute, reported in October, 1872, where the Supreme Court of New York, after a most elaborate investigation into the case, held that votes cast for a candidate by persons having notice of his ineligibility were void. That is a case in which this whole doctrine is examined. I will not tire the court by reading the decision. The point is, that ineligibility at the time of the election renders the votes cast for the ineligible candidate void, and therefore he cannot qualify himself for an office to which he is not elected, from the fact that the votes cast for him cannot be counted at all. If that be true, it is perfectly immaterial how many frauds Governor Warmoth and his board may commit, so far as this complainant is concerned.

But, sir, suppose I am wrong as to that proposition. I still take the ground that this court's time cannot be encroached upon to adjudicate future rights which may never arise. If the complainant comes here claiming that this court has equity jurisdiction to issue this injunction for the purpose of perpetuating testimony to be used in a suit that he intends to bring, he must show that he is in a position to bring that suit; he must show that he is in a position now to stand in court. He could not bring a suit for the office of Governor as long as he occupies the position of United States Senator, because he has no interest involved which would be recognized in a court of justice.

If the court should render a decree in his favor he could not take the office. He is not debarred from the office by denial of the right to vote on account of race, color, or previous condition of servitude; but he is debarred the office by virtue of the Constitution of the State, which says that no Senator of the United States shall hold the office of Governor, or be eligible thereto. He is now, being in the position of Senator, without right to bring this suit, because he is not capable of holding the office. Will your honor, therefore, allow the valuable time of this court to be wasted in going into an investigation to determine these momentous questions of fraud between these parties,

and to determine these momentous constitutional questions, and after you have done so, for Mr. Kellogg to turn around and put the decision in his favor in his pocket and go away from the State, because he does not choose to be qualified and resign his office under the United States? It is a different case where a man is qualified at the time of his election. He can go into a court of justice to have his right asserted, and then if he does not choose to exercise it, it is his business; but his right is a personal right; it is a vested right. The decision of your honor now would not be in favor of any personal or vested right, or of any existing right; but in favor of a possible condition of things which may or may not arise. It seems to me that under the decision of the Supreme Court of the United States in the case of Cross and Du Valle, reported in 1st Wallace, this court is not going to lose its time upon the adjudication of prospective, contingent future rights. The book is not here, but I assert the proposition. It was a case where the parties called upon the court to decree what would be their rights on a future contingency; and the Supreme Court of the United States cited with approbation the opinion of Lord Justice Turner, of the Court of Chancery Appeals of England, to the effect that the time of the court must not be allowed to be wasted in the adjudication of future rights, but that the party seeking relief must have some vested right at the time.

Now, may it please your honor, I believe I have discharged the duty which was imposed upon me in the opening of this case on behalf of the defense. I have presented all the law which I think we will present, so far as the principles which I contend for have been discussed. What I have to say in conclusion is this: that upon a motion for an injunction, the universal rule in chancery is that the court will not intervene to restrain any one from acting merely upon the allegation that certain apprehended frauds are about to be committed, without specific allegations and proof, outside of the mere allegations, of the

frauds which it is apprehended the party will commit. I read from 7th Robertson's New York Reports, 280:

"The bare allegation of a fear that defendant is about to do some act, without alleging the facts and circumstances which *prima facie* justify such fears, will not authorize an injunction to restrain the commission of an apprehended act."

The other principle to which I desire to call the attention of the court is, that on a motion for an injunction, where the affidavits and the answer deny all the allegations in the bill, the injunction, if issued, should be dissolved; and, of course, on a rule *nisi* the injunction should not issue at all. (3d Robertson's N. Y. Reports, 523; 26 Maryland, 82; 37th Georgia, 392; 4th New Jersey.) And where collusion and fraud are charged, the answer of one defendant is considered sufficient for all. Now, sir, that being the case here, we have nothing but the bare allegation of William Pitt Kellogg that the Governor and these gentlemen are about to commit these enormous crimes and offenses, in which he charges that a contract was made with every supervisor of registration, before his appointment, to carry out this contemplated scheme by which the voice of the people was to be defeated—an allegation, sir, which the statutes of the State prove to be false, because the registration law was passed in 1870 which required the appointment of registrars throughout the State, and of the chief registrar, whose office should continue for two years; and the chief registrar of this State had been in office two years before this election. This complainant, Kellogg, was nominated for office, as sworn to in the answer, in July, 1872, and the presumption is that the Governor of this State exercised his duty under the registration act in the appointment in 1870 of these officers. There is no allegation in the bill that he removed those who were incumbents and put in new ones for the purpose of carrying out and perfecting this conspiracy. So that the very first allegation in the bill—that the scheme was to control the

votes of this State by these fraudulent appointments—is untrue, on the face of the statute of the State.

There is no allegation in the bill, in regard to the election commissioners, that these frauds were to be committed by the commissioners of election. Their reputation, at least, is unsullied and unstained, so far as this complainant is concerned; and the frauds in regard to suppressing votes could not be committed, except through the instrumentality or the fraudulent conduct of the commissioners of election. Your honor will notice that of the ten thousand voters alleged to have been excluded from the right of voting, not one single solitary voter has had his affidavit filed in this case, to show that he was so excluded on account of race, color, or previous condition of servitude. If we are to take the three or four affidavits which I have read as a sample of the five thousand which they say they will file, there is not one to the effect that any man was excluded from registration or voting on account of race, color, or previous condition, and not one deponent swears that he is a colored man. And yet, sir, this restraining order has been issued upon that foundation. The gentleman says that these are samples; if they are samples, not one of them is admissible in evidence; and I suppose, without examining the whole bundle of merchandise which has been brought in here, that they correspond to the samples. Not one of them, therefore, comes within the act of Congress, entitling such votes to be counted, because the allegation in the bill is that they were excluded from voting because they were excluded from registration. It is not pretended in the bill that anybody was excluded from voting who was registered. The only allegation, so far as votes excluded are concerned, is, that they were excluded from registration. In that event, they must prove that they made affidavits before the registration officers, at the time that they offered to register, that they were refused on account of race, color, or previous condition of servitude; and then with those affidavits they

must make new affidavits, that they were refused the right to vote at the polls upon the affidavit made at the time of registration. Read the act of Congress, and you will find that the second and third sections require that it should appear by affidavit, that the party was refused registration on account of race, color, or previous condition, and then by a second affidavit that he was refused the right to vote on that account, though he produced the first affidavit to the commissioners of election. I say, sir, that there is not a solitary affidavit of any man here who swears that he was rejected for other causes than the want of registration, and not one swears that he was rejected on account of race, color, or previous condition of servitude.

You can estimate from these samples the value of the other allegations contained in the bill. Wherever we have had the slightest opportunity to examine anything outside of the oath of this remarkable man, charging this remarkable fraud upon this number of men throughout the State, we contradict him. If he refers to the law, we contradict him. If he produces affidavits, they themselves contradict him. In the affidavit of Antoine, the candidate for Lieutenant Governor, and also United States officer, as to the rejection of five hundred votes in the parish of Caddo, he does not swear that those votes were registered or were refused registration. He swears, in substance, that he knows of his own knowledge, and from information derived from others, that five hundred men were on election day refused the right to vote, on account of race, color, or previous condition. He does not say that they were registered voters. He does not swear, so far as I know, that any one was refused the right to register. I would like to know whether any of the large number of affidavits filed to-day are from the parish of Caddo. I don't know, as I have not examined them. The complaint also brings the affidavits of the two Lotts and of Kelso, that fifteen hundred legitimate votes were refused registration in the parish of Rapides, and that this was done in the months of September

and October. Why was not your honor appealed to prior to this election? This court had jurisdiction in the matter. The act of 1872 required this court, at the instance of the United States marshal, to go up there in the neighborhood of Rapides, if there had been any such refusal on account of race, color, or previous condition, and to enforce the rights of these men. Was your honor ever called upon to go there and enforce these rights? You might have gone there in September or October, and, by the decrees of this court, have remedied these alleged frauds. These men, after remaining silent until after the election, are now brought up to support this monstrous and untruthful bill, filed against the officers of this State, throughout its entire length, and against gentlemen of as high honor as any in this country.

The very vote published in the papers of these parishes will convince your honor, if you will read it, that these affidavits are false. Take the vote and compare it with the census of the United States as to population; take the vote cast by both parties in those two parishes of Caddo and Rapides, and I say that your honor will come to the conclusion that these affidavits are false. There was a larger vote for both parties in both of those parishes in 1872 than at any other election, and a very large one in proportion to the population of the State, white and colored. Therefore, sir, this bill stands without any support as to fact, except the affidavit of the complainant. Governor Warmoth has denied it throughout in the most formal manner, and all of the defendants to the bill have denied it. Upon the sworn denial of the defendants, then, on the motion to dissolve, the preliminary injunction will be dissolved, and therefore, of course, it will not be granted upon the rule to show cause.

I have done, sir. If I have done nothing more in making this extended argument, I have vindicated a man who, whatever may have been his course in the past, at least cannot now be charged with doing anything detrimental to

the interests of this State. I have shown that this suit is gotten up in consequence of political acrimony, arising out of personal difficulties and disputes in politics between these parties; that there is no foundation in law and no foundation in truth in the allegations contained in this bill; and that the only course which is left to your honor to pursue is to turn this party, so far as this injunction is concerned, out of court, and tell him there is no evidence which he has any interest to preserve, and that all the evidence he wants preserved is preserved for him in the public records of the country.